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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 300

SOCONY MOBIL OIL COMPANY, INC.,
Petitioner,

VS.

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS COMPANY, INC.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT COMPANY and
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

THOMAS FLETCHER
2025 First City National Bank Building
Houston 2, Texas
Attorney for Petitioner,
Socony Mobil Oil Company, Inc.

Of Counsel:
JOHN L. DANIEL
20th Floor First City National Bank Bldg.
Houston 2, Texas

August 6, 1962.

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No. .....

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VS.

BROOKLYN UNION GAS COMPANY, ET AL,

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TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 14, 1962, (App. 9a) and judgment upon its Petition for Rehearing entered May 21, 1962 (App. 10a) affirming judgment of the United States District Court for the Southern District of Texas, Houston Division, in favor of Brooklyn Union Gas Company, et al, Plaintiffs below, and Transcontinental Gas

Pipe Line Corporation, defendant and cross-plaintiff below,[1] and against Socony Mobil Oil Company, Inc. and the Ohio Oil Company. (R. 779.)[2]

OPINIONS BELOW

The District Court issued a Memorandum on June 29, 1960 (R. 651, App. 12a) 201 F. S. 673, denying Mobil's Motion for Summary Judgment; granting Brooklyn Union's first Motion for Summary Judgment against Mobil; denying Brooklyn Union's second Motion against Transco; and granting Transco's first and second Motions for Summary Judgment; denying efficacy to the reservation of fact made by Mobil.

Thereafter Transco filed a fourth Motion for Summary Judgment, granted in a further memorandum dated November 23, 1960. (R. 754, App. 25a) 201 F. S. 679. The Opinion of the Court of Appeals, styled Socony Mobil Oil Company v. Brooklyn Union Gas Company, et al, 299 F. 2d 692, is contained in the Appendix hereto. (App. 1a)

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[1] All of the parties named in the caption except Delaware Power & Light Company and Transcontinental Gas Pipe Line Corporation were Plaintiffs below in C. A. 12474; Delaware Power & Light Company was Plaintiff in C. A. 12482; Transcontinental Gas Pipe Line Corporation was a Defendant and Cross-Plaintiff in both causes; Socony Mobil Oil Company, Inc. and the Ohio Oil Company were Defendants in both causes. Claims against Socony Mobil Oil Company, Inc. and against the Ohio Oil Company were based upon separate and distinct contracts with each and upon separate facts peculiar to each. Each presented its own Motions and defenses. This Petition deals solely with Socony Mobil Oil Company, Inc.'s contentions and the facts appropriate thereto. In this Petition the parties will be referred to as follows: Plaintiffs, as Brooklyn Union; Transcontinental Gas Pipe Line Corporation, as Transco; this Petitioner, as Mobil; and the Ohio Oil Company, as Ohio.

[2] The record certified from the court below referred to as "R"; the Appendix to this Petition as "App."

JURISDICTION

The judgment of the Court of Appeals was entered February 14, 1962 (R. 843, App. 9a); that denying Mobil a Rehearing, was entered May 21, 1962 (R. 908, App. 10a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I.

Whether Section 4 of the Natural Gas Act not only requires that a rate to be legally effective must be filed with the Federal Power Commission, but also renders invalid and unlawful a rate not so filed as required.

II.

Whether the Federal Power Commission, denied power by the Natural Gas Act to fix, make and establish rates, is empowered by Section 16 of that Act to issue a regulation which legislatively enlarges its substantive powers so that it can thereby and thereafter have and exercise the specific power to fix, make and establish rates.

III.

Does failure of a producer to file a sales contract with the Federal Power Commission as a rate schedule, claimed to be subject to regulation under the Natural Gas Act, and failure to make further filings of increased rates provided in such contract, either alone or coupled with a court declared purpose "solely ancillary" to determining the effect of the Court's stay order in another and prior cause, give a court power and jurisdiction to exercise power, primarily and exclusively given by the Natural Gas Act to the Federal Power Commission to determine

lawfulness, i.e., justness and reasonableness, of such contract prices, and direct refund of contract payments in excess of that price adjudged by the Court to be lawful and controlling.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. Sections 717, et seq) are set forth in the Appendix filed herewith (pp. 34a-41a).

STATEMENT

(a) *The Proceedings in the District Court:*

On January 10, 1959, Brooklyn Union, resting jurisdiction generally on the diversity statute and the Act, sued Transco, Mobil and Ohio in the District Court (R. 31) for the difference between 9.7978150¢ per Mcf (R. 37) as "the only lawful rate and charge" and 2.17¢ per Mcf, allegedly paid between February 1, 1955 and January 31, 1957, pursuant to a written sale contract between Magnolia[4] and Transco dated September 12, 1947, for gas from West Gueydan Field, Vermilion Parish, Louisiana, for a term of twenty years. (R. 500, 512, 526-61)

Brooklyn Union plead, inter alia, that *Phillips*[5] subjected the sale to regulation by the Commission; that Commission Orders 174 (19 Fed. Reg. 4534) and 174-A (19 Fed. Reg. 5081) were rate-fixing and rate-making

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[3] On January 12, 1959, Delaware Power & Light Company similarly sued in State Court. Suit was removed (R. 144), and consolidated for trial. (R. 580)

[4] Magnolia Petroleum Company, wholly owned by Mobil, was merged into Mobil effective September 30, 1959. (R. 637)

[5] *Phillips Petroleum Co.* v. *Wisconsin* (June 7, 1954) 347 U. S. 672.

orders setting the only lawful rate collectible by Mobil as that effective on June 7, 1954; that on, and pending appeal from such Orders,[6] the Court of Appeals for the Fifth Circuit issued a stay order, (containing no refund conditions), staying Order 174-A (R. 485); that the appeal was dismissed for want of jurisdiction on June 30, 1956, *Magnolia Petroleum Co. v. F. P. C.*, 236 F. 2d 785, cert. den. 352 U.S. 968; that when the stay was terminated,[7] an obligation to refund arose; that such refund should be distributed by a formula agreement with Transco in a Commission rate proceeding, which Transco alleged it filed, among other reasons, for passing on to its customers, including Brooklyn Union, such purchase prices for gas paid Mobil. Mobil was not a party to the Commission proceeding.

Magnolia held that Orders 174 and 174-A were not adjudicatory or definitive, but were regulations of general applicability which did not and could not adversely affect Mobil except upon the contingency of some future administrative action; did not subject Mobil to Commission jurisdiction; were not self-executory; did not command Mobil to do or refrain from doing anything. (p. 791-2)[8]

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[6] By §19 of the Act, 15 U. S. C. §717r(b). App. 38a.

[7] The stay order was continued pending Petition for Certiorari to this Court (R. 495-6); following denial by this Court, 352 U. S. 968, the Fifth Circuit forwarded its mandate on February 1, 1957, to the Commission. (R. 496-7)

[8] *Magnolia's* holding was consistent with similar decisions of other circuits, none of which held Order 174 or 174-A to be rate-fixing, rate-making, or rate-adjudicatory orders. *See Amerada Petroleum Corp. v. F. P. C.* (10 Cir., 1956) 231 F. 2d 461; *F. P. C. v. Union Producing Co.* (D. C. Cir., 1956) 230 F. 2d 36, cert. den. 351 U. S. 927; *Natural Gas Pipe Line Co. v. Harrington* (5 Cir., 1957) 246 F. 2d 915, cert. den. 356 U. S. 957; *Rel Oil Corp. v. F. P. C.* (5 Cir., 1958) 255 F. 2d 548, cert. den. 358 U. S. 804; *Cities Service Gas Prod. Co. v. F. P. C.* (10 Cir., 1956) 232 F. 2d 726, cert. den. 352 U. S. 911; *Phillips Petroleum Co. v. F. P. C.* (10 Cir., 1958) 258 F. 2d 906.

Mobil, in answer to Brooklyn Union and Transco (R. 282, 326, 368, 412) and in Motion for Summary Judgment (R. 462) plead, inter alia, lack of jurisdiction; the complaint's failure to state a federally cognizable cause of action; that if the sale was subject to Commission regulation,[9] primary jurisdiction of the Commission controlled, so thus the Court had no power to determine, fix, or establish any rate as lawful during the past periods involved, or to determine another rate as unlawful, or to award a judgment for reparations, being the difference between the Court determined lawful rate and the contract stipulated rate collected, whether it purported to act from common law, or by authority of the Act; that the Act abrogated common law causes of action; that the Commission and courts were powerless to inquire into rate lawfulness for past periods; that Commission proceedings between Brooklyn Union and Transco created estoppel, for the Commission, accepting their representations of lawfulness, approved settlement rates designed to recover the purchase price paid Mobil; that recovery by Brooklyn Union and Transco would unjustly enrich each, would constitute unilateral contract destruction; that Transco's payments per the contract were voluntary; and that the claim was barred by the two year statute of limitations of the State of Texas.[10]

The trial court (R. 651, et seq) denied Mobil's Motion for Summary Judgment but granted those of Brooklyn Union and Transco. It held Orders 174 and 174-A were rate orders which made and established June 7, 1954 rates as Mobil's lawful rates, and which prohibited different

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[9] Mobil filed the Transco contract as a rate schedule in February, 1957, after the pertinent times here involved.

[10] If this writ be granted Petitioner reserves the right upon the merits to brief and present its claims respecting estoppel, unjust enrichment, lack of right to restitution, and limitations.

rates from becoming effective or collectible without a filing and 30-day notice provided by said orders and Section 4(d) of the Act. Contract control was ignored.[11] The Court denied invasion of primary jurisdiction of the Commission, declaring it was merely "recognizing and determining" that Order 174-A made the lawful rate and prohibited all other rates as unlawful without Commission permission. Mobil's reserved fact issues were irrelevant, the Court saying it was no concern of Mobil whether Brooklyn Union received any of Mobil's gas or not, since Brooklyn Union asserted Transco's cause of action.[12] (R. 659-60).

Following this decision, Transco filed a fourth Motion for Summary Judgment (R. 666, et seq) seeking recovery against Mobil for those listed in Exhibit 1 (R. 674-6) in the amount opposite each name.[13] None of these were parties. Transco exhibited no authority from any of them to sue on their behalf. The court (R. 754, et seq) granted Transco's Motion.

Judgment was entered against Mobil (R. 779, et seq) in favor of Brooklyn Union for $508,384.58, and in favor of Transco for $30,423.28, with interest from the date of each monthly payment by Transco to Mobil beginning on March 8, 1955. (R. 780)[14]

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[11] The thesis of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956) 350 U.S. 332, is that the contract controls subject to modification in the public interest by the Commission.

[12] There was no assignment from Transco to Brooklyn Union. Brooklyn Union and the Court assimilated statements in Transco's pleading to an assignment. (R. 660; 634)

[13] The sums sought range from a low of $22.00 (Bowman, Georgia), to a high of $4,314.36 (Danville, Virginia).

[14] Every one of these payments but the last one on February 28, 1957, were made prior to February 1, 1957, the date on which the trial court held the cause of action *first arose*. (R. 661) All but two were paid more than two years before suit was filed.

(b) *The Judgment of the Court of Appeals.*

On appeal,[15] the Court of Appeals in an opinion by Judge Hutcheson, Chief Judge Tuttle and Judge Jones concurring, affirmed the trial court. The Court of Appeals seemed chiefly preoccupied with finding its stay order issued in *Magnolia*, "not guilty". Mobil never accused it.

Erroneously, the Court stated (App. 3a) Mobil contended that "• • • because of [the] stay order • • • the rates collected [by Mobil] • • • were legal and proper • • • and when • • • the stay order lapsed, the rates collected in the meantime could not be attacked and no refunds could be required • • •". Mobil at no time advanced such a contention.

Mobil contended the stay order was not addressed to, nor affected, rates, nor authorized it to collect any rate; that it only stayed and only declared that it stayed enforcement of Order 174-A, a procedural rule *applicable only after filing with the Commission.*

Mobil's contention that contract rates collected could not be attacked sprang not from the stay order, but solely from the lack of power of both courts below to determine lawfulness of such rates, a power granted by the Act exclusively to the Commission. Its claim that no "refunds" could be required, issued from the Act's express denial to the Commission of power to order reparations, or to consider lawfulness of rates for past periods: powers which the Courts as well are denied; and, also, from the voluntary character of the payments.

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[15] Brooklyn Union and Transco stipulated with Mobil (R. 795) waiving necessity for Mobil to file supersedeas bond under Rule 73(d) F.R.C.P., and agreed that the judgment of the trial court should be stayed and no execution issued on such judgment until final determination by the Court of Appeals or by this Court.

The Court declared that order did not attempt to validate or authorize collection of any rate; (App. 3a, 4a), but inconsistently stated it interfered with collection of rates above the June 7, 1954 level so that upon dissolution, a duty of restitution arose, to restore to Transco and Brooklyn Union amounts collected during pendency of the stay in excess of the June 7 rate. (App. 5a)

The Court reasoned that the contract rates paid "were invalid and unlawful * * * because * * * Section 4 of the statute * * * and Orders Nos. 174 and 174-A * * * require, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, * * * ". Further, without such filing, followed by Commission approval, no such proposed change of rate could be lawfully collected. Proof of unlawfulness was deemed manifest, because filing with the Commission did not occur "until long after" the collections. (App. 3a, 4a)

The Court further declared it could determine merits "by recognizing and determining the lawful rates on June 7, 1954". (App. 4a) It rationalized justification for such exercise of power as being "solely ancillary to determining the effect of the stay orders and their dissolution, * * * " (App. 4a) and of Mobil's failure to file as required.

Repeating the withering ukase of rate invalidity it said Order 174-A and Section 4 of the Act worked from failure to file initially, the Court stated that any rate change provided by the contract was also "forbidden", absent compliance with such filing provisions. (App. 5a)

Curiously, though seeking to justify this invasion of the Commission's primary jurisdiction to "determine" "lawful rates" because "solely ancillary to determining the effect of its stay orders", and so order a money recovery based on such determination; it also confessed its

lack of authority to establish rates or to do "indirectly what the court could not do directly", (App. 6a) while recognizing its stay order did not affect obedience to the Act or compliance with the Regulations. (App. 6a) Realistically evaluated, its decision demonstrates the stay order affected nothing, protected nothing.

It stated the stay order preserved an unlawful status quo, declaring that the status quo "* * * was that until the proposed changes in rates * * * were filed with the Commission, they could not be legally collected, and that when the stay expired all unlawful exactions must be restored." (App. 6a-7a) While reiterating that "at the time the stay orders were issued, the lawful rates established by virtue of the Act and the Regulations of the Commission, were the contract rates of June 7, 1954," (App. 6a) the Court proclaimed that such stay order "did not deal with, or attempt to change, this situation at all."

In Mobil's respectful submission, the stay order could not be both fish and fowl; it could not at the same time affect rates to support a money judgment, and not affect rates to exculpate exercise of power not possessed.

Other portions of the Opinion are not pertinent to the questions presented.

REASONS FOR GRANTING THE WRIT

This is the first case in which this Court has been called upon to consider whether the Federal Power Commission is empowered by Section 16 of the Natural Gas Act to issue a regulation and thereby clothe itself with a power denied it by Congress in the Act. It is also the first case in which this Court has been called upon to consider whether Section 4 of the Act requires that a rate, to be legally effective, must

be filed with the Commission and whether that Section also renders invalid and unlawful a rate not so filed. The court below held that a producer's failure to file a contract with attendant rate invalidity, created a category and area in which the courts could determine lawfulness and adjudicate the consequences without impinging upon power exclusively given the Commission by the Act to determine lawfulness. The decision below squarely presents broad and highly important questions of construction of the Act and the substitution of judicial dictate for the administrative determination stipulated by the statute, contrary to decisions of this Court.

Petitioner accordingly submits that the Court of Appeals has decided important questions of Federal law which have not, but should be, settled by this Court, and has decided them in a way which will not only have serious and substantial effect on the administration of a vital Federal statute, but which opens the door to variation and fluctuation of doctrine from court to court and between court and agency in such fashion as to call for review by this Court.

The Act vested the Commission exclusively as statutory agent of Congress with broad discretion of expert judgment. The powers granted the Commission were denied to the courts. Lawfulness, i.e., justness and reasonableness, was a determination peculiarly within the expertise of the Commission, and that determination was authorized *only prospectively*. The court below did not heed these commands, but instead misconstrued the Act and invaded the primary jurisdiction of the Commission to reach a decision which accorded with its own views of rate lawfulness. Petitioner submits that these matters all furnish additional appropriate reasons for granting the

review requested and a definitive settlement thereof by this Court.

POINT I.

THE COURT OF APPEALS HAS DECIDED ERRONEOUSLY AN ISSUE OF GENERAL IMPORTANCE WHICH THIS COURT HAS NOT SETTLED BUT SHOULD DETERMINE, IN HOLDING THAT SECTION 4 OF THE NATURAL GAS ACT NOT ONLY REQUIRES THAT A RATE TO BE LEGALLY EFFECTIVE MUST BE FILED WITH THE FEDERAL POWER COMMISSION BUT FURTHER PROSCRIBES AS INVALID AND UNLAWFUL A RATE NOT SO FILED.

It is apparent that the Court has misconceived and misconstrued the Act. It declared:

> "* * * the rates paid during the pendency of the stay order were invalid and unlawful * * * because * * * Section 4 * * * requires, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, * * *" (App. 3a)

This mistaken concept is reiterated several times in the course of the Opinion.

Sections 4(c) and 4(d) are the heart of the matter, and are procedural in character only. Section 4(c) requires filing of rates or rate contracts with the Commission. Neither directly nor inferentially does it ordain that validity or legal effectiveness depend upon filing. It requires filing alone, nothing more. Failure to file does not leave the Commission powerless; it can enforce filing.

Equally, Section 4(d), dealing with notice of changes in rate, is expressly applicable only to a rate schedule or contract *already on file* as an initial rate under Section

4(c), or as changed by a prior filing. The language is:

> "• • • no change shall be made by any natural-gas company in any *such* rate, charge • • • or contract relating thereto, except after thirty days' notice to the Commission and to the public."[16]

The antecedent of "such" is the rate already on file by Section 4(c) as an initial rate, or a rate theretofore changed but on file. Section 4(d) provides for notice only and contains no grant of power either to the Commission or to any independent producer subject to its regulation.

In *Mobile* this Court viewed Sections 4(c) and 4(d) as notice sections only, the first addressed to all rates and contracts, the second to changes in "previously filed" rates or contracts (p. 338). Such requirements of filing were necessary to implement the rate review powers of Sections 4(e) and 5(a). (p. 341-2). Since contracts control relationships between the parties, filing permitted Commission supervision of individual contracts, which furnished protection of the public interest (p. 339)

United Gas Pipe Line Company v. *Memphis Light, Gas & Water Division* (1958), 358 U.S. 103, holds the same view of Sections 4(c) and 4(d) (p. 111). Summing up, this Court said:

> "United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so. The Act comes into play as to rate changes only in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission, in the case of rates for sales of gas • • • other than exclusively industrial • • • to suspend the new rates • • • pending

[16] All emphasis in this Petition supplied unless otherwise noted.

a determination of the lawfulness of the rates as changed." (p. 113)

It seems clear from *Mobile* that the Section 4(d) change is effected not by an approving order of the Commission, but by the action alone of the regulated company (p. 342), and when so "effected", like any other rate, can be set aside only upon being found unlawful in a Commission review (p. 342).

Finally, *Mobile* concluded upon this review of the provisions of Sections 4 and 5(a) that they "simply" defined and implemented Commission powers to review rates set by the natural gas companies "and there is nothing to indicate that they were intended to do more." (p. 343)

The holding below is squarely in conflict with this Court's decisions in *Mobile* and *Memphis*.

Sections 20 and 22 of the Act provide the Commission with ample power to enforce and compel filing. (App. 39a, 40a)

Additionally, § 1.6 (App. 41a-43a) of the Commission's "Rules of Practice and Procedure" furnished a ready prescription to the Commission, Brooklyn Union and Transco for a proceeding against Mobil to show cause why it should not file, and § 1.9(c) (App. 44a-45a) required a detailed answer under oath. Applicability of this specific section has been noted in a case of similar circumstances. *Interstate Natural Gas Co.* v. *Southern Cal. Gas Co.* (D.C.S.D. Cal. 1952) 103 F.S. 318, aff'd (9 Cir. 1953) 209 F. 2d 300, 385. Power to enforce filing by Mobil, if owed, was ample.

Nor was this power in any manner interfered with or emasculated by the stay order in *Magnolia*. That order did not purport to stay the Act or the Rules of Practice and Procedure against Mobil: it only stayed Order 174-A, a procedural regulation applicable only after filing.

The Fifth Circuit in *Magnolia* specified that if Commission jurisdiction existed there, it arose from the Act itself, not "by virtue" of Order 174-A (p. 791).

Indeed, contrasting the stay order against the inert nature which *Magnolia* ascribes to Orders 174 and 174-A, except upon contingency of future administrative action, which never occurred, that order stayed nothing.

Furthermore, the Court of Appeals use of "lawful" in connection with rates is equally mistaken. Section 4(a) provides:

> "All rates and charges made, demanded, or received by any natural-gas company for • • • sale of natural gas subject to the jurisdiction of the Commission • • • shall be just and reasonable, and any such rate • • • *that is not just and reasonable is hereby declared to unlawful.*"

This definition neither expressly, nor by inference, includes the concept of requirement of "filing". Nor does it give rise to a justiciable right. *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.* (1950) 341 U. S. 246; *T. I. M. E., Inc.* v. *U. S.* (1959) 359 U. S. 464.

Section 4(b) expands and clarifies the Section 4(a) definition by prohibiting "undue preference" or "any unreasonable difference." The courts, in discharging their review functions, construe "just and reasonable" as a rate not so low as to jeopardize the regulated companies contemplated public service, and not so high as to penalize unjustly purchasers, all as measured by constitutional standards. *F. P. C.* v. *Hope Natural Gas Co.* (1944) 320 U. S. 591; *Montana-Dakota*, supra. Only Commission review can specify where stands the just and reasonable rate level. *Montana-Dakota.* This function Congress entrusted only to the Commission, not to the Courts. *Hope*,

supra, at page 617-8; *Montana-Dakota* at page 251-2. Thus the Act expressly declares that "lawfulness" and "justness and reasonableness" are precisely the same.

"Lawfulness" is a term of art under the Act and carries no gloss save that which derives from §§ 4(a) and 4(b). Petitioner respectfully suggests that the Court of Appeals was without warrant in holding that "lawfulness" depended upon filing, and that failure to file produced "unlawfulness."

The holding that filing was prerequisite to lawfulness and that unlawfulness was consequent upon failure to file is in conflict with the Ninth Circuit in *Interstate Nat. Gas Co.* supra, p. 384, and with its own decision in *Harrington.*

There, the Fifth Circuit said failure to file a contract which "should have been filed" did not prevent Commission jurisdiction from attaching. It noted that nothing in the Act or Commission orders indicated there was no effective or lawful rate until such time as the rates were filed. "To the contrary • • • the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the • • • Commission." (p. 919)

Correctly, in *Harrington*, it noted that neither the Commission "nor • • • any court possessed" power to look into the past to fix retroactively a "just, reasonable and lawful rate." This was so because the parties had fixed the rate to be charged "by their solemn and binding contract, and that contract rate could be changed only by the • • • Commission after a hearing • • • [under] • • • Section 5(a) • • •", citing Mobile. (p. 918-9)

Such an "intra-circuit" conflict has been held to call for review by this Court. *Dickinson* v. *Petroleum Conversion Corp.* (1950) 338 U. S. 508; *John Hancock Mut. Life Ins. Co.* v. *Bartels* (1939) 308 U. S. 180, 181.

The Ninth Circuit in *Interstate Natural Gas* was just as categorical (p. 384), as *Harrington*, relying upon the holding of this Court in *United States Nav. Co.* v. *Cunard S. S. Co.* (1932) 284 U. S. 474, 486, the logic of which it said was reaffirmed in *Far East Conference* v. *U. S.* (1952) 342 U. S. 570.

POINT II.

IN DECLARING THAT ORDER 174-A FIXES AND MAKES RATES, A POWER DENIED THE COMMISSION BY THE ACT, THE COURT BELOW HOLDS THAT THE COMMISSION MAY, BY REGULATION, LEGISLATIVELY CLOTHE ITSELF WITH SUCH DENIED POWER — A FEDERAL QUESTION OF IMPORTANCE WHICH THIS COURT HAS NOT SETTLED BUT SHOULD DETERMINE, AND WHICH HOLDING IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT.

The Court below fundamentally misconceived the Act in holding:

> "• • • the lawful rates established, by virtue of the Act and the Regulations of the Commission, [are] the contract rates of June 7, 1954." (App. 6a)

The Act denies any power to the Commission to fix or establish rates; it gives power only to review rates set and established by the regulated company. Petitioner submits that the Commission could not accomplish by Order 174-A, a mere regulation, what it was expressly denied power to do by the Basic Act. *Mobile* held that the Commission's power, defined by §§ 4(e) and 5(a) was to "set aside and modify" any rate which after hearing it found to be unjust and unreasonable. This it declared was neither "rate-making nor rate-changing" procedure but "simply the power to

review rates and contracts made * * * by natural gas companies" and to "remedy" them if found unlawful. (p. 341)

The power to make and change rates, *Mobile* observed, belongs to the regulated company, and was no different from such powers the regulated companies would possess in the absence of the Act, and when made or changed could only be set aside or modified if found unlawful by the Commission in a review of such rates. (p. 342-3)

Memphis established that where the *contract* reserved right to change, change was freely available to the regulated company, subject, of course, only to Commission review.

Here, the Mobil-Transco contract provided for changes, and, as in *Memphis*, stipulated how the changes were to be measured. These were the contract rates which the court below in disregard of the contract ordered paid back. They could not be unlawful; and there was no Section 5(a) hearing or order purporting to change, modify or set aside said contract — the only means by which the contract rates could be changed.

This disregard of contract is in direct conflict with *Mobile* and *Memphis*, as well as the Fifth Circuit's earlier decision in *Harrington*, which recognized and enforced the contract rate, as controlling, though unfiled with the Commission. Thus, the court below permitted Transco "unilaterally" to change and repudiate an agreed contract rate in the face of no contract invalidity. Equally it permitted Brooklyn Union, owning no contract privity, to set aside the contract and recover contrary to its terms.

Thus the contract rate is changed not by a Commission Order pursuant to Section 5(a) review, but by substitution of judicial dictate resulting from usurpation of powers granted solely to the Commission.

The holding furnishes yet another instance of intra-circuit conflict, in this instance with *Magnolia*.

By this intra-circuit conflict, Mobil falls between two stools: *Magnolia*, a 19(b) appeal, holds that Order 174-A is not self-executing, not adjudicatory, does not establish jurisdiction or rates, and is ineffective unless upon the contingency of future administrative orders, upon which the appeal was dismissed; whereas, here, the time long since having expired for a Section 19(b) appeal and review, the court below does an about face and holds that Order 174-A is an effective, self-executing adjudicatory order making and establishing rates. This conflict demands that this Court should assume jurisdiction and authoritatively determine the issue.

Congress in giving the Commission power by Section 16 of the Act to issue regulations, never intended or purported to authorize it by regulation to amend legislatively the basic act and thus confer upon itself powers expressly denied it by the basic act. Yet, as the meaning and effect of Orders 174 and 174-A are proclaimed by the court below, that is precisely what is accomplished.

In this holding the court below is in direct conflict with the Court of Appeals for the District of Columbia Circuit in *Willmut Gas & Oil Co*, v. *F. P. C.*, (1961) 294 F. 2d 245, cert. den. 368 U. S. 975; rehearing denied by this Court March 5, 1962. There the issue was whether the Commission's failure to adopt a regulation prohibiting a Section 4(d) filing prior to completion of review of a prior 4(d) filing constituted an abuse of discretion. In rejecting the Court said:

> "Section 16 of the Act speaks in broad and general terms: it provides, *inter alia*, that 'The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appro-

priate to carry out the provisions of this Act." But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e). As the Supreme Court said in the Mobile opinion, 'The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.' An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation, which Willmut suggests, would deny to United the right to change rates at which it offers service, which the Mobile decision says is the right of a natural gas company. *Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission.*" (p. 250)

POINT III.

IN EXERCISING JURISDICTION AND POWER GIVEN BY THE NATURAL GAS ACT TO THE PRIMARY AND EXCLUSIVE JURISDICTION OF THE FEDERAL POWER COMMISSION, THE COURT BELOW HAS RENDERED A DECISION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF ITS OWN AND OTHER CIRCUITS ON THE SAME PRINCIPLE.

The decision below is dangerous and requires correction at the hands of this Court, not only because it conflicts with applicable decisions of this Court as well as its own and other Circuits; but because, if allowed to stand, it would create by exception an area within which courts could move

to exercise the primary jurisdiction of the Commission and create conflicting and differing rules of decision varying from court to court which would produce chaos, confusion and uncertainity as to what rules govern and control.

The opinion below contains proof of these considerations: (1) the court could decide "merits" by "determining the lawful rates on June 7, 1954"; (2) this was not "fixing any just or reasonable rate or granting reparations" because "solely ancillary" to determining effect of the stay order and of Mobil's failure to file with the Commission as required by Section 4 and Orders 174 and 174-A; (3) the rates were "unlawful" because not filed with the Commission until long after collection; (4) the only lawful rates from June 7, 1954 until Mobil received approval from the Commission of different rates were fixed by Section 4 of the Act and Order 174-A as the rates of June 7, 1954, and no other rates could be collected; (5) the court below admitted lack of authority to so establish rates. The record reflected no Section 5(a) order by the Commission modifying Mobil's contract rates at any of the pertinent times involved.

It is fundamental that rate making is a legislative function, *Prentis* v. *Atlantic Coast Line Co.* (1908) 211 U. S. 210, 225, given exclusively to the Commission, in which the courts will not interfere, for their only function is the review provided by Section 19 (15 U. S. C. A. §717r), which is limited to keeping the Commission within the bounds which Congress has created. *Colorado Interstate Gas Co.* v. *F. P. C.* (1944) 324 U. S. 581, 589; *Montana-Dakota*, supra, p. 251; *Harrington*, supra, p. 918; *Mississippi Power & Light Co.* v. *Memphis Nat. Gas Co.* (5 Cir. 1947) 162 F. 2d 388, 390, cert. den. 332 U. S. 770; *Michigan Cons. Gas Co.* v. *Panhandle Eastern Pipe Line Co.* (6 Cir. 1949) 173 F.

2d 784; *Natural Gas Pipe Line Co.* v. *F. P. C.* (1944) 141 F. 2d 27; *McClellan* v. *Montana-Dakota Utilities Co.* (8 Cir., 1953) 204 F. 2d 166, 168, 169, cert. den. 346 U. S. 825.

Several basic reasons exist for this rule. There is the principle of primary administrative jurisdiction, for which the bell-wether case is *Texas & Pacific R. R.* v. *Abilene Cotton Oil Co.* (1907) 204 U.S. 426; see, too, *Interstate Nat. Gas Co.*, supra.

In *Montana-Dakota* (p. 250) this Court said that suit could not be instituted in a federal court to recover a portion of past rates on the ground of unreasonableness, for plaintiff would be out of court for failure to exhaust administrative remedies, because at any time in the past it could have applied to the administrative agency for review. Further, this Court said that the right to a reasonable rate was that which the Commission set and the courts were without power to authorize commerce in the commodity on other terms. (p. 251)

We have demonstrated above that failure to file in no wise deprived the Commission of jurisdiction. *Interstate Natural Gas Co., supra*, citing *U. S. Navigation v. Cunard, supra*, and *Far East Conference, supra*, pointed out that primary jurisdiction could not be avoided by the expedient of refusing to file, for the Commission was "fully empowered by §717m(a), 717d(a) and 717s, 15 U.S.C.A., to afford relief upon its own motion or upon complaint." (p. 384)

The Commission's own Rules of Practice prescribed ample administrative remedy if contract rates were questioned (see *infra* p. 14). These Rules of Practice were not a part of Order 174 or Order 174-A and were wholly outside the pale of the stay order.

Finally, *Texas Pacific* v. *Abilene Cotton Oil Co., supra*, noted that judicial action invasive of administrative pri-

mary jurisdiction would not only destroy the administrative act but would lead to chaotic confusion, because "* * * unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question." (p. 440)

The excuse of "solely ancillary" for determining effect of the stay order seems unpersuasive. In simple, direct terms, that order stays Order 174-A; a procedural rule. Pursuit of "effect" does not turn upon collateral exercise by the Court of the Commission's primary jurisdiction. The Commission's jurisdiction arose by the Act; not the stay order; not Order 174 or 174-A. If exercise of the forbidden power was the genesis of such order, the order would be as void as the exercise of such forbidden power.

Jurisdiction asserted was diversity and the Natural Gas Act (R. 31). Both by answer (R. 283) and Motion for Summary Judgment (R. 462) Mobil assailed jurisdiction.

Thus both courts below were confronted by the same dilemma which this Court discussed in *Montana-Dakota*, supra. Brooklyn Union showed diversity, but no common-law right. The complaint, relying generally on the Act, clearly was an effort to recover the difference between an alleged lawful or just and reasonable price and the price charged alleged to be unlawful. This is simple reparations — a power not only denied the Commission, but the courts.

Nor was jurisdiction created or rescued by Brooklyn Union's specious claim of a Transco assignment. (R. 659-60; App. 20a). Transco had no cause of action to assign. It made no effort to assign. It was absolutely bound by its

valid contract, subject only to modification by the Commission under Section 5(a) of the Act, which never occurred. *Mobile, supra.*

Furthermore, the common law cause which had existed prior to the passage of the Act was by that Act abrogated and superseded so that no such cause of action existed. The complaint stated no cause cognizable by federal courts. *Montana-Dakota, supra; United Gas Pipe Line Co.* v. *Willmut Oil & Gas Co.* (S. Ct. Miss., 1957) 97 So. 2d 530, cert. den. 357 U. S. 937; *Garner* v. *Teamsters & H. Union* (1953) 346 U. S. 485; *Watab Paper Co.* v. *Northern Pac. Ry.* (8 Cir. 1946) 154 F. 2d 436, 438; *Glassberg* v. *Boyd* (Del. Ch. 1955) 116 A. 2d 711, 716-7.

The court below ignored and is in direct conflict with these applicable decisions. This Court, in *Montana-Dakota*, declared that courts in determining allegations of fraud and deceit could neither originally nor by reference execute the power and jurisdiction given to the administrative agency.

The Sixth Circuit in *Michigan Consolidated, supra*, squarely held such powers could not be exercised for purposes of determining right to specific performance.

The Ninth Circuit in *Interstate Nat. Gas Co., supra*, affirmed a strong opinion by the District Court (102 F. S. 685) and held that primary jurisdiction forbade judicial determination of lawfulness with respect to claims of anti-trust.

The Eighth Circuit in *McClellan* v. *Montana-Dakota, supra*, affirming 104 F. S. 46, held a suit for damages for the difference between alleged unreasonable rates and just rates in the past could not be maintained in connection with the claimed anti-trust violation, and followed

the District Court opinion in *Interstate Nat. Gas Co., supra.*

As pointed out above, the court below is in conflict with itself in *Harrington,* wherein it held that it could not exercise the prerogatives of the Commission in connection with the determination of lawfulness of rates.

But the disregard of applicable decisions is compounded. The court below notes (App. 4a) that Mobil filed nothing with the Commission until long after the pertinent dates involved in this cause. The Commission's rate review power is prospective only. Sec. 5(a). *F. P. C. v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 618. The dates involved were between 1955 and 1957, and were thus for past periods. It is no longer open to question that the Act does not give the Commission power to award reparations, nor to determine lawfulness of past rates; while courts are denied independent power thereabout. *F. P. C. v. Hope, supra,* p. 618; *Montana-Dakota, supra,* p. 254; *State Corporation Commission of Kansas v. F. P. C.* (8 Cir. 1954) 215 F. 2d 183, 194; *Harrington, supra,* p. 918; *United Gas Pipe Line Company v. Willmut Oil & Gas Company, supra.*

The conflict in which the court below finds itself between the instant decision and that in *Harrington,* is made more dramatic by its reversal in this Court's opinion in *T. I. M. E., supra,* p. 469-70. In *T. I. M. E.* this Court reaffirmed its holdings in *Montana-Dakota* that the statutory language which entrusts rate regulation to the administrative agency creates only a "'criterion for administrative application in determining a lawful rate', rather than a 'justiciable legal right'"; and that the statutory declaration that unreasonable rates are "unlawful", does not create a cause of action for the recovery of allegedly un-

reasonable past rates, finally declaring that a study of the Motor Carrier Act there involved led this Court "to the conclusion that here, as in the Federal Power Act, Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert 'unreasonable' as a defense in carrier suits to recover applicable tariff rates." (p. 470).

The Act here contains similar language, yet this suit is one wherein Brooklyn Union and Transco seek to recover under the statute for allegedly unreasonable past rates, the granting of which by the court below required it to, as it did, determine both lawfulness and unlawfulness of matters entrusted to the Commission.

T. I. M. E. also reaffirmed the declaration of *Texas & Pacific* v. *Abilene Cotton Oil Co.* that the congressional delegation to the administrative agency of power to determine rates necessarily extinguished as "'absolutely inconsistent' with the recognition of the Commission's primary jurisdiction" any common law right, and declared that a court "must decline to consider a defense [or complaint, as here] which 'involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide . . .'" (p. 473, 475).

Petitioner comes back, then, to the pronouncement of *Montana-Dakota*, particularly apropos here: "But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce." (p. 251)

CONCLUSION

The matters discussed above are believed to involve novel questions of construction and interpretation of the

Natural Gas Act and the powers of the Commission and the courts thereabout, as well as questions of Federal law which individually are of such importance to the future administration and application of the Act that they should be settled by this Court. Petitioner submits that the decision below invades the statutory province reserved exclusively to the discretion and expertise of the Commission, and substitutes for the administrative discretion and judgment, the judgment of the court, which, indeed, is contrary to applicable decisions with which it is in conflict, as well as decisions of its own, all of which make it appropriate for this Court to assume jurisdiction and make appropriate determinations thereon.

It is accordingly prayed that the Writ of Certiorari to review the judgment of the court below be granted.

Respectfully submitted,

THOMAS FLETCHER
2025 First City National Bank Building
Houston 2, Texas
Attorney for Petitioner.

Of Counsel:

JOHN L. DANIEL
20th Floor First City National Bank Bldg.
Houston 2, Texas

ARY
COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 300

SOCONY MOBIL OIL COMPANY, INC.,
Petitioner,

VS.

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS COMPANY, INC.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT COMPANY, and
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS FLETCHER
2025 First City National Bank Building
Houston 2, Texas
Attorney for Petitioner,
Socony Mobil Oil Company, Inc.

Of Counsel:
JOHN L. DANIEL
20th Floor First City National Bank Bldg.
Houston 2, Texas

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18941

SOCONY MOBIL OIL COMPANY, INC.,
Appellant,

versus

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees.

No. 18942

THE OHIO OIL COMPANY,
Appellant.

versus

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees.

No. 18943

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellants.

versus

TRANSCONTINENTAL GAS PIPE LINE CORPORATION ET AL.,
Appellees.

No. 18944

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellant,

versus

THE OHIO OIL COMPANY and SOCONY MOBIL OIL COMPANY, INC.

Appellees.

Appeals from the United States District Court for the Southern District of Texas.

(February 14, 1962)

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: These appeals from summary judgments of the United States District Court for the Southern District of Texas present many interesting questions of law. The district judge, in a memorandum opinion,[1] set forth these questions clearly and dealt with them in a thorough and completely correct way. It would serve no useful purpose therefore, for us to set the questions out or discuss them in detail here. It is sufficient to say that it is our view that the judgments should be affirmed throughout upon the opinion of the district judge.

[1] Brooklyn Union Gas Co., et al v. Transcontinental Gas Pipeline Corp., et al, (6-29-60) 201 F. Supp. 673.

Summed up, the appeals present on the side of the appellants, Socony Mobil Oil Company, Inc., Et Al, the primary contentions: (1) that because of a stay order entered by this court in *Magnolia Petroleum Co. v. Federal Power Commission*, 236 F (2) 785, in an appeal from Order No. 174-A of the Federal Power Commission, the rates collected by the appellants were legal and proper, and when the appeal was decided against the appellants by a dismissal and the stay order lapsed, the rates collected in the meantime could not be attacked and no refunds could be required as to them; and (2) that the proof failed to make out a case for restitution.

As the opinion of the district judge points out, this view proceeds from a misapprehension of the nature and effect of the stay order and of the state of the applicable law. As he also points out, this court dismissed the appeal in which the stay order was entered on the ground that Order No. 174-A, which was attacked by the appellants in that case, was not an appealable order, and this court did not, either in the order dismissing the appeal or in any other order entered by it, undertake to in any way validate the rates collected by the appellants. As he further points out, the rates paid during the pendency of the stay order were invalid and unlawful rates not merely because of the order of the Commission but because of Section 4 of the statute controlling and regulating gas rates and the regulations of the Commission promulgated as Orders Nos. 174 and 174-A. This section requires, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, and unless there is such filing and the statutory time for the Commission's examination and approval has elapsed without disapproval, no proposed change of rate may be lawfully made, collected, and retained.

Here the evidence is undisputed that the proposed rates collected by the appellant, the recovery back of which was ordered by the district judge, were not filed with the Commission until long after they were collected, and equally undisputed that this court did not authorize, or attempt to authorize, the collection of any particular rate. It merely provided a stay of Commission action during the pendency of the appeal, and when the appeal was dismissed by this court and review was later denied by the Supreme Court, the stay order expired and lapsed, and the parties to the collection and payment of the rates in question were then remitted to the statutory law to determine their rights on the issue of restitution.

In addition to the attack on the judgment as unwarranted because the rates collected by them had been collected under a valid contract, appellants attack the judgment as erroneous because the claims against them were barred by limitation.

The district judge dealt carefully with this claim and we think correctly denied it. As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations. Its action was solely ancillary to determining, the effect of the stay orders and their dissolution, and of the failure of appellants to file their proposed changes of rates as required by statute and the regulations of the Commission. The rate settlement between plaintiffs and Transcontinental does not preclude such a determination on grounds of estoppel because the refund clause of the agreement between Transcontinental and Brooklyn plainly

declared that there might be refunds and that if there were, they would belong to the consumer plaintiffs.

Plaintiffs were entitled to recover on the merits because the only lawful rates from June 7, 1954, until appellant received approval from the Federal Power Commission of different rates were the contract rates in effect on June 7, 1954. Under Section 4 of the Natural Gas Act and Order 174-A, the contract rates in effect on June 7, 1954, the date of the Phillips decision, were the only lawful rates which could be collected until changed by filing the proposed changes with the Federal Power Commission as required by statute. Any rate changes provided for in the contract, whether by virtue of a "favored nations" or "escalation clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act and the regulations of the Commission.[2]

The stay orders issued by the Court of Appeals for the Fifth Circuit at the request of Mobil and Ohio et. al. did no more than prevent the Commission from interfering with the collection by Mobil and Ohio et. al. of rates above the June 7, 1954 level. When these stay orders were dissolved, and Mobil and Ohio et. al. filed their contracts with the Commission and the filings were accepted at the June 7, 1954, level, a duty of restitution arose, requiring Mobil and Ohio et. al to restore to Transcontinental and/or plaintiffs amounts collected during the pendency of the stays in excess of the June 7th rate.[3]

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[2] Natural Gas Pipeline Co. of America v. Harrington, 246 F. (2) 915; Bel Oil Corp. v. Federal Power Commission, 255 F. (2) 548; Mississippi Power & Light Co. v. Memphis Natural Gas Co., 162 F. (2) 388.

[3] Natural Gas Pipeline Co. v. Harrington, 246 F. (2) 915; Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 249 U. S. 134.

The stay orders cannot be construed as protecting Mobil and Ohio et. al. in the retention of the overcharges for two reasons: (1) this court does not have the authority to establish rates, and to construe the stay orders as approval of the increased rates would be to impute to the court the doing indirectly what the court could not do directly; and (2) although the stay orders, until dissolved, supported Mobil and Ohio's et. al. action in collecting the proposed rate for the time being, in the sense that the Commission was restrained from preventing them from making such collections, the stay orders did not attempt to, they could not, obviate the necessity of filing them in accordance with the statute and the regulations of the Commission. *United Gas Pipeline v. Mobile Gas Co.*, 350 U. S. 332 at 347. The stay orders neither by their terms nor by implication provided, nor could they have provided, that the statute and the regulations of the Commission, legislative in nature as they were, would not have to be complied with in order to effect a change in the rates; and nothing in the stay orders stated or implied that Mobil and Ohio et. al. could retain monies collected during the pendency of the stay orders on rates put into effect without complying with the statute and regulations.

A stay order does not adjudicate rights. It merely preserves the status quo. The status quo here was that until the proposed changes in rates by escaluation or otherwise, were filed with the Commission, they could not be legally collected, and that when the stay expired all unlawful exactions must be restored. At the time the stay orders were issued, the lawful rates established, by virtue of the Act and the regulations of the Commission, were the contract rates of June 7, 1954. The stay orders did not deal with, or attempt to change, this situation at all. This court did not, indeed could not, authorize an increase in the law-

ful rates. Such authority could be granted only by a compliance with the statute and regulations promulgated under its authority. The stay orders could not have had any effect on the statutory scheme. We think the court can not do better than to adopt the opinion of the district judge and affirm his judgments on the basis of it.

Another question raised in the case by the defendants-appellees arises out of the fact that, while the contract was made by the appellants with the Transcontinental Gas Pipe Line Corporation, the suit was brought by and for the benefit of Transcontinental's customers with Transcontinental intervening. Appellants-defendants, therefore, insist that there is no privity of contract between them and these customers and that there is no right of action in the customers to recover from them.

We think the district judge was right in respect of these contentions under the record in this case, which contains a notation in an order of the Commission in connection with the settlement made by Transcontinental with the plaintiffs, that any recoveries back which Transcontinental might be entitled to should be for the benefit of its customers. On the pleadings and the undisputed facts in this case, plaintiffs were real parties in interest and entitled to judgment as such.

In addition to these questions, there is a question which is brought up on the appeal of plaintiffs in the suits. This question is whether the judgment was wrong in not allowing interest on interest. These appellants insist that the judgment, which was for the amount of the unlawful rates collected without interest up to but not after the date of the judgment, was erroneous, and that judgment should have been for the amounts collected with interest to the judgment date, and this entire amount should have then borne interest from the date of the judgement.

The district judge was of the opinion that to allow a judgment such as this would be to allow compound interest and that the prevailing Texas rule, as stated in *McDaniel v. Miller*, 317 SW (2) 546, prevents this. The appellants, while conceding that the state of the law in Texas is confusing on this matter, argue that the McDaniel case is not controlling authority in Texas, that for its particular facts, the case was properly decided, but that *Frazier v. Campbell*, 5 Texas 275 and *Miner v. Parish Exchange Bank*, 53 Texas 559, decided the contrary.

While it is true that there is considerable confusion in the Texas decisions, we are inclined to follow Judge Ingraham's view[4] that the McDaniel case is authoritative here, and we are, therefore, of the opinion that the judgment should be affirmed on the plaintiffs' appeals as well as on the defendants' appeals.

We think the case was well tried throughout and, no substantial error appearing, the judgments are

AFFIRMED.

Reported: at 299 F 2d 692

[4] Brooklyn Union Gas et al. v. Transcontinental Gas Pipeline Corp. et al. (11-23-60) 201 F. Supp. 679.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 18941

D. C. Docket Nos. 12474 and 12482 Civil

SOCONY MOBIL OIL COMPANY, INC.,
Appellant,

versus

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before Tuttle, Chief Judge, and Hutcheson and Jones, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and as argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Feb 14 1962

FILED
21st Day of May, 1962
Edward W. Wadsworth
Clerk of the United States Court of Appeals.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18941

SOCONY MOBIL OIL COMPANY, INC.,
Appellant

VS.

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees

No. 18942

THE OHIO OIL COMPANY,
Appellant

VS.

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees

No. 18943

BROOKLYN UNION GAS COMPANY ET AL
Appellants

VS.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION ET AL,
Appellees

No. 18944

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Appellant

VS.

THE OHIO OIL COMPANY and SOCONY MOBIL OIL COMPANY, INC.
Appellees

Appeal from the United States District Court for the Southern District of Texas.

(May 21, 1962)

On Petition for Rehearing

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petitions for rehearing in the above entitled and numbered causes be, and they are hereby DENIED.

ORDER DENYING PETITIONS FOR REHEARING FILED — MAY 21, 1962

IN THE

United States District Court

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS CO.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT CO.,
Plaintiffs,

VS.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
SOCONY MOBIL OIL COMPANY, INC.,
THE OHIO OIL COMPANY,
Defendants.

CONSOLIDATED
C.A. 12,474
and
C.A. 12,482

JUNE 29, 1960

These consolidated proceedings consist of actions in which plaintiffs, who are distributors of natural gas in eastern seaboard areas, seek restitution of monies paid by defendant Transcontinental Gas Pipe Line Corporation (Transco) to defendants Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio) through increases in price for natural gas sold and delivered to

Transco. The case is submitted upon the pleadings, affidavits, and motions for summary judgment of all parties concerned.

Transco operates under certificate from the Federal Power Commission an interstate natural gas pipe line from Texas to New York. Prior to June 7, 1954, Transco entered into separate natural gas purchase and sales contracts with Mobil and Ohio, covering natural gas from the West Gueydan Field in Vermillion Parish, Louisiana, and from the North Markham-North Bay City Field in Matagorda County, Texas, respectively. The Mobil contract included a "favored nations" clause providing for increases in price, while the Ohio contract contained a provision for periodic and tax reimbursement price increases. Prior to June 7, 1954, Transco commenced purchasing gas under these contracts, commingling it with other gas in its line and delivering it to customers, including plaintiffs, along its pipe line. Mobil's contract price on June 7, 1954, was 9.79150 cents per m.c.f., while Ohio's contract price on said date was 8.730376 cents per m.c.f.

On June 7, 1954, the Supreme Court of the United States held in Phillips Petroleum Co. v. Wisconsin, 1954, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, that Phillips, a natural gas producer and gatherer, was a "natural gas company" within the meaning of that term as defined in the Natural Gas Act, 15 U.S.C.A. Sec. 717, et seq. Both Mobil and Ohio were and are engaged in the business of producing, gathering, *and selling natural gas in interstate* commerce. The Phillips decision is applicable to both of them. Thus the rates at which they sell natural gas are subject to regulation by the Federal Power Commission.

On July 16, 1954, the Federal Power Commission issued its Order No. 174, 19 F.R. 4534. Among other things, this

order required every independent producer engaged in the interstate transportation or sale of natural gas since June 7, 1954, to file with the Commission copies of rate schedules setting forth all rates and charges for the sale of natural gas which were in effect on June 7, 1954. The order further provided that no change could be made in these June 7, 1954, rates without first giving 30 days' notice of such change pursuant to Section 4(d) of the Natural Gas Act. Order No. 174-A of August 6, 1954, 19 F.R. 5081, and succeeding amendments, simplified and clarified the procedures by which producers apply for a certificate of public convenience and necessity but did not change the foregoing rate requirements.

Pursuant to Section 19(b) of the Natural Gas Act, Mobil and Ohio each filed a petition for review of Order No. 174-A in the United States Court of Appeals for the Fifth Circuit, questioning whether the Commission was empowered to regulate the price increase provisions of their contracts with Transco as changes in rate. These petitions sought a stay of that order concerning operations of Mobil and Ohio, including their contracts with Transco. In November 1954 a stay of Order No. 174-A as to Mobil and Ohio was issued by the Court of Appeals. Later, on June 30, 1956, the petitions for review were dismissed, though certification of the opinion and judgment to the Federal Power Commission was stayed by the court to permit the filing of applications for certiorari in the Supreme Court of the United States, which applications were denied on January 14, 1957. After denial of certiorari, the stay orders were dissolved on February 1, 1957. Magnolia Petroleum Company, et al. v. Federal Power Commission, 5 Cir., 1956, 236 Fed. (2d) 785.

Only after denial of certiorari did Mobil and Ohio file their Transco contracts with the Federal Power Commis-

sion as rate schedules or otherwise. During the pendency of the stay order from February 1, 1955, through January 31, 1957, charges were made to Transco by both Mobil and Ohio in excess of the rates which were in effect on June 7, 1954. Though made pursuant to the price increase provisions of the Transco contracts, such charges were made without giving 30 days' notice thereof to the Federal Power Commission and to the public in accordance with the provisions of Section 4(d) of the Natural Gas Act and as required by Order No. 174-A. The amounts involved in this controversy are the payments in excess of the rates in effect on June 7, 1954, made by Transco to Mobil and Ohio during the period from February 1, 1955, through January 31, 1957.

On November 26, 1954, Transco filed rate schedules with the Federal Power Commission providing for increases in the rates to be charged by Transco to plaintiffs and other public utility and industrial customers for natural gas service. Another filing seeking additional increases was made by Transco on January 20, 1955. The Federal Power Commission consolidated these matters and commenced hearings on June 20, 1955, which continued for some months. Meanwhile the rates filed on November 26, 1954, went into effect on February 1, 1955. With matters in this status, each plaintiff entered into an agreement with Transco on October 5, 1955, for the complete settlement of Transco's rate proceedings before the Federal Power Commission, which was made a part of the record of the proceedings before the Commission.

On November 7, 1955, the Federal Power Commission issued an order approving the proposed rate settlement. Among other things this order contained the following specific provision:

> "In the event any of the suppliers of Transco whose rates are currently in effect under an undertaking or under bond, or whose rates are currently being charged under court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of said refund attributable to natural gas purchased from said supplying company or companies by Transco, after Transco's increased rates were permitted to become effective to cover such increased cost of gas, shall be refunded to Transco's utility customers within 60 days after receipt of such refund by Transco . . ."

Both the agreement and the order provide a detailed method of computing the refund to be paid to each of Transco's utility customers. On January 10, 1959, all plaintiffs, except Delaware Power & Light Company, instituted Civil Action No. 12,474 in this court against Transco, Mobil, and Ohio. On January 12, 1959, Delaware Power & Light Company filed a similar action in the District Court of Harris County, Texas, 127th Judicial District, under Docket No. 520,558, which cause was thereafter removed to this court by Transco as Civil Action No. 12,482 and was later consolidated with C.A. No. 12,474. In C.A. 12,474 plaintiffs seek a total recovery in the amount of $912,414.72, plus interest, and separately claim from Mobil and Ohio the sums of $494,626.64 and $417,788.08, respectively. In C.A. 12,482 the total amount sought is $25,378.60, plus interest, while the separate claims against Mobil and Ohio are $13,757.92 and $11,620.68, respectively.

The basis of plaintiffs' action against Mobil and Ohio is that the contract rates in effect between Transco and Mobil and Ohio on June 7, 1954, were the only lawful rates which could be charged for gas delivered by Mobil and Ohio to Transco during the period from February 1, 1955, through January 31, 1957. During this period the charges in excess of the alleged lawful rate were passed on to plaintiffs and

other customers of Transco. As the real parties in interest, plaintiffs now seek restitution of what they consider to be their just portion of the excess charges. Asserting Transco's claims against Mobil and Ohio, they maintain that Transco has effectively assigned to plaintiffs said claims in its answer, counter-claim, and cross-claim.

Against Transco plaintiffs claim any monies that it may recover from Mobil and Ohio, since the agreements and order provide for such a refund in the event any of the suppliers of Transco, whose rates were being charged under court stay orders, were required to make refunds to Transco. They contend, however, that Transco is liable to them regardless of whether it has collected from Mobil and Ohio and even though it might not have collected had it vigorously pursued its remedies. They rest Transco's said liability upon an implied obligation arising under the refund provision of the settlement agreements and order to exercise reasonable diligence to secure the refunds due Transco, including the timely filing and good faith prosecution of suits, if necessary, against Mobil and Ohio. They maintained that Transco has not fulfilled this obligation by merely filing a cross-action for declaratory relief in the present action and failing to pursue vigorously its rights against Mobil and Ohio in plaintiffs' behalf.

Mobil contends that neither plaintiffs nor Transco can recover any monies from it, since the court does not possess the legislative power of rate-making and cannot fix or determine what were the just and reasonable rates for Mobil's gas sold to Transco and cannot award reparations. It claims that the Federal Power Commission approved rates in Transco's rate proceeding designed to recover Transco's cost of service, including recoupment of charges paid Mobil by Transco, on representations that such costs, expenses, and rates which would recoup them were proper, just, and lawful as the Natural Gas Act requires. Whereby

Mobil argues that plaintiffs and Transco have no right of recovery and ought to be estopped from asserting that such costs and expenses are unlawful, unjust, and unreasonable. It maintains that the Fifth Circuit's stay order fully protected Mobil from any refund. It cites various reasons why recovery by plaintiffs would be inequitable and asserts that Trans cannot recover upon its counterclaim and cross-claim for declaratory judgment.

Ohio contends that the Fifth Circuit's stay order granted it full immunity from the requirements of Order No. 174-A and of Section 4 of the Natural Gas Act and that there can be no recovery because the court of appeals did not condition the stay on the giving of any bond or any agreement to refund. It argues that the court is not authorized to award reparations. It would show that plaintiffs' claim, if any ever existed, is now barred by limitations, citing Article 5526, Revised Civil Statutes of Texas, which applies to debts where the indebtedness is not evidenced by a contract in writing. Ohio then sets forth the equitable considerations supporting judgment in its favor and against judgment for plaintiffs.

Transco contends that the real controversy is between plaintiffs and Mobil and Ohio and that its only obligation, in the nature of a stakeholder's or interpleader's, is to pay over and account to plaintiffs for any monies that plaintiffs may recover from Mobil and Ohio and that the court may direct be paid to Transco by Mobil and Ohio for distribution to plaintiffs. It maintains that plaintiffs have failed to state an independent claim against Transco arising out of the refund provision of the settlement agreements and order.

The court believes that the following actions should be taken on the motions for summary judgment. Plaintiffs'

first motion for summary judgment against Mobil and Ohio should be granted, while their second motion against Transco should be denied. Transco's first and second motions for summary judgment should be granted. The motions for summary judgment of Mobil and Ohio should be denied.

This case can be decided on motions for summary judgment in favor of plaintiffs and Transco, since there is no genuine issue as to any material fact and since said moving parties are entitled to judgments as a matter of law. Mobil and Ohio contend that there are genuine issues of material fact, namely, whether any of the gas sold to Transco, was resold to plaintiffs and, if so, what portion reached each plaintiff and what amounts of money, if any, may be recovered by each plaintiff from Mobil and Ohio. These alleged issues are irrelevant because plaintiffs are asserting Transco's cause of action. Mobil and Ohio do not contest the amount of gas delivered to Transco nor the amounts charged therefor. The higher rates charged by Mobil and Ohio resulted in greater charges to plaintiffs by Transco. What distribution of over-payments to Mobil and Ohio is made to Transco's customers is a matter between Transco and its customers. It is no ground upon which Mobil and Ohio can avoid repayment, if they are protected from further payment or a multiplicity of suits.

The amounts that plaintiffs seek to recover against Mobil and Ohio are shown in Exhibit "E" attached to plaintiffs' original complaints, which amounts are certified by the affidavit of J. T. Duncan, Assistant to the Financial Vice-President of Transco. All of the plaintiffs are utility customers of Transco; each was a party to the settlement agreements with Transco which were approved by the Federal Power Commission. The amounts alleged to be due to each plaintiff, as set forth in Exhibit "E", were computed

in accordance with the formula stated by the Federal Power Commission in its order approving the rate settlement with Transco.

Plaintiffs are the assignees of Transco's cause of action and are the real parties in interest. Transco effectively assigned its claims against Mobil and Ohio to plaintiffs by its pleadings. See Transco's answer, counter-claim, and cross-claim, p. 8, par. (c); p. 15, par 33; and p. 22, par. 19. All the parties to the assignment are before the court. So long as Mobil and Ohio can satisfy their obligation to Transco by paying plaintiffs, which Transco freely states, any defense to the assignment which could be asserted by Transco in a suit by plaintiffs against Transco is of no consequence to Mobil and Ohio.

Plaintiffs' claims are not barred by limitations, since neither the two-year period of Article 5526 nor the four-year period of Article 5527, Vernon's Texas Civil Statutes, would bar recovery. Article 5526 applies to actions for debt where the indebtedness is not evidenced by a contract in writing. Covering many actions for "money had and received", Ohio contends that said statute applies to the case at bar. Article 5527 refers to actions for debt where the indebtedness is evidenced by or founded upon any contract in writing. Plaintiffs contend that the latter statute governs the case at bar. The controlling question, however, is the date upon which the cause of action arose. It is evident that the cause of action did not arise until the day when the stay orders were dissolved, namely, February 1, 1957. The excess rates were lawfully collected during the pendency of the stay orders. Natural Gas Pipeline Co. of America v. Harrington, 5 Cir., 1957, 246 Fed. (2d) 915. Since these actions were filed on January 10 and 12, 1959, it is apparent that they are not barred by either the two-year or the four-year statute of limitations; nor can

plaintiffs' claims be considered barred by laches, since no extraordinary circumstances exist whereby said claims should be barred before the period of limitations has run. Culver v. Pickens, 1943, 176 S.W. (2d) 167.

The court may decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company, S.D. Tex., 1954, 130 Fed. Supp. 890. By finding the lawful rates as established by order of the Federal Power Commission, the court is not fixing any just or reasonable rate or granting reparations. Its action is solely ancillary to determining the effect of the stay orders and their dissolution. The rate settlement between plaintiffs and Transco does not preclude such a determination on grounds of estoppel because its refund clause plainly contemplated that there might be refunds that would be passed along to plaintiffs.

Plaintiffs are entitled to recover on the merits because the only lawful rates from June 7, 1954, until Mobil and Ohio received approval from the Federal Power Commission of different rates were the contract rates in effect on June 7, 1954. Under Section 4 of the Natural Gas Act and Order 174-A the contract rate in effect on June 7, 1954, the date of the Phillips decision, was the only lawful rate until changed by filing with the Federal Power Commission. This is true even though the contract rate was unfiled. Any rate changes provided for in the contract, filed or unfiled, whether by virtue of a "favored nations" or "escalation" clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act. Natural Gas Pipeline Co. of America v. Harrington, supra; Bel Oil Corporation v. Federal Power Commission, 5 Cir., 1958, 255 Fed. (2d) 548; Mississippi Power & Light Co. v. Mem-

phis Natural Gas Company, 5 Cir., 1947, 162 Fed. (2d) 388; Cities Service Gas Producing Co. v. Federal Power Commission, 10 Cir., 1956, 233 Fed. (2d) 726; Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 1956, 231 Fed. (2d) 461; Phillips Petroleum Co. v. Federal Power Commission, 3 Cir., 1958, 258 Fed. (2d) 906; Episcopal Theological Seminary v. Federal Power Commission, D.C., 1959, 269 Fed. (2d) 228.

The stay orders issued by the Court of Appeals for the Fifth Circuit at the request of Mobil and Ohio temporarily allowed them to increase their prices above the June 7, 1954, level without approval by the Federal Power Commission. When those stay orders were dissolved and Mobil and Ohio filed their contracts with the Commission, the filings were accepted at the June 7, 1954, level. A duty of restitution arose, requiring Mobil and Ohio to restore to Transco amounts collected during the pendency of the stays in excess of the June 7 rate. Natural Gas Pipeline Co. of America v. Harrington, supra; Arkadelphia Milling Co. v. St. Louis S.W.R.Co., 1919, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517; Berthold-Jennings Lumber Co. v. St.Louis I.R.& S.Ry.Co., 8 Cir., 1935, 80 Fed.(2d) 32.

The stay orders cannot be construed as protecting Mobil and Ohio in the receipt of overcharges for two reasons: (1) courts do not have the authority to establish rates and construing the stay orders as approval of the increased rates imputes to the court an attempt to do indirectly what it cannot do directly and (2) although the stay orders, until dissolved, relieved Mobil and Ohio of the necessity, for the time being, of filing in accordance with Order No. 174-A, the stay orders neither by their terms nor by implication provided that Mobil and Ohio could retain monies collected during the pendency of the stay orders nor did the orders relieve them from the consequences of their

failure to comply with Order 174-A. A stay order does not adjudicate rights but merely preserves the status quo. Scripps-Howard Radio, Inc. v. Federal Communications Commission, 1942, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229.

At the time the stay orders were issued, the lawful rates had been established as the contract rates of June 7, 1954. Natural Gas Pipeline Co. v. Harrington, supra. Since the Fifth Circuit could not authorize an increase in the lawful rate, the stay orders could not have had that effect, and the court could have intended nothing more than to permit Mobil and Ohio to collect the higher rates until the final determination of that case. In the Berthold-Jennings and Arkadelphia cases the railroads obtained injunctions against the state railroad commission's enforcement of the established maximum freight rates, which injunctions permitted the railroads to collect higher rates. After the dissolution of the injunctions, the railroads were required to repay the over-charges they had collected on the theory of restitution. The fact that no bond had been required of the railroads after the granting of the permanent injunction did not alter the result.

In this case Mobil and Ohio obtained stays of the Federal Power Commission's order, which permitted them to collect higher rates. After the dissolution of the stay orders, they must repay the charges they have collected in excess of the lawful rates. In collecting the increased rates under the stay orders, they assumed the risk of being required to refund them if the litigation terminated adversely to them.

Since plaintiffs can recover against Mobil and Ohio, it is unnecessary to determine whether they state an independent claim against Transco arising out of the refund provision of the settlement agreements and order.

Plaintiffs' first motion for summary judgment against Mobil and Ohio will be granted. Their second motion for summary judgment against Transco will be denied. Transco's first and second motions for summary judgment will be granted. The motions for summary judgment of Mobil and Ohio will be denied.

JOE INGRAHAM,
United States District Judge

Reported at 201 F.S. 673

IN THE

United States District Court

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS CO.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT CO.,
Plaintiffs,

VS.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
SOCONY MOBIL OIL COMPANY, INC.,
THE OHIO OIL COMPANY,
Defendants.

CONSOLIDATED
C.A. 12,474
and
C.A. 12,482

NOVEMBER 23, 1960

In opinion filed June 29, 1960, plaintiffs, distributors of natural gas, were given restitution of monies paid by Transcontinental Gas Pipe Line Corporation (Transco), to its co-defendants, Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio), through increase in price

for natural gas sold and delivered to Transco. Defendant and cross-plaintiff Transco's fourth motion for summary judgment and alternative motion for severance is before the court. This motion deals with Transco's right to recover from Mobil and Ohio, for the use and benefit of its customers other than plaintiffs, the sum of $56,120.41, together with interest thereon. This amount represents the difference between the sum of $937,793.32 which plaintiffs will recover from Mobil and Ohio under the rulings of this court and the total of $993,913.73 paid by Transco to Mobil and Ohio from February 1, 1955, to February 1, 1957, in excess of contract prices in effect on June 7, 1954. Names of these customers (other than plaintiffs) and amounts payable to each are found in the affidavit attached to this fourth motion.

Transco's alternative motion for severance will be denied. The subject matter of the so-called fourth motion has already been submitted to the court. This motion should be disposed of and and not tried piecemeal. The claims asserted by plaintiffs and the claim sought to be asserted by Transco on behalf of its other utility customers arise out of the same factual circumstances. Should Mobil and Ohio appeal, the whole matter should be taken up. Fed. Rule Civ. Proc. 54(b) will not be used here.

Mobil's and Ohio's answers to the fourth motion of Transco urge two grounds for denial: (1) lack of jurisdiction in that no diversity, requisite amounts, or federal questions are shown; and (2) unresolved factual issues bar summary judgment. The court is however of opinion that jurisdiction is present and that no factual issues remain. Transco's fourth motion for summary judgment will be granted. These two supposed impediments will be disposed of separately.

Much is said at page two of Mobil's answer about lack of diversity and amounts involved. Mobil's briefs in support of its motion for summary judgment make the same argument. This court necessarily rejected these contentions by overruling Mobil's motions for summary judgment in their entirety. Further, Transco's motion is a cross-claim within Fed.Rule Civ.Proc.13(g). As such it is ancillary to the related, principal claim. No independent jurisdictional basis need be laid for a cross-claim. 3 Moore's Federal Practice, Sec. 13.36 (2d Ed. 1948). Our circuit court so held in Childress v. Cook, 245 Fed.(2d) 798, 802-805 (5th Cir. 1957).

Mobil and Ohio argue that certain factual issues are yet unsettled. These are said to prevent summary judgment. These issues summarized are what amounts, if any, of the gas sold to Transco was resold to these customers of Transco, not named as plaintiffs, and what amounts of money, if any, may be recovered by each customer from Mobil and Ohio. Mobil and Ohio do not contest the amount of gas delivered to Transco nor the charges therefor. These issues are irrelevant for the reasons suggested in the opinion of June 29, 1960. They are disposed of at pages eleven and twelve thereof. The court remains of the view announced at page eleven, second paragraph of the June opinion, ". . . there is no genuine issue as to any material fact . . ."

It necessarily follows from my rejection of severance of Transco's fourth motion that the form of judgment tendered by plaintiffs will not suffice. That form does not reflect this disposition of the fourth motion. The final judgment to be entered herein must include today's granting of Transco's motion. Mobil and Ohio level other criticisms at plaintiffs' proposed judgment. These will now be considered.

Plaintiffs have tendered a form of judgment which would permit recovery from Mobil of $643,363.30 and from Ohio the sum of $544,744.86. The figures recoverable as the excess over the rates of June 7, 1954, were respectively $508,384.56 and $429,408.76. Thus, plaintiffs have tendered a judgment which will permit them recovery of $250,314.84 in excess of the principal amount allowed by the opinion of June 29, 1960. This difference constitutes interest for the withholding of such sums from the dates on which such sums were received from Transco by Mobil and Ohio. At page three of plaintiffs' motions for summary judgment such interest was requested. This court so noted at page seven of the June opinion. Mobil and Ohio state that this opinion did not allow such interest, and hence plaintiffs' proposed judgment is excessive by this interest amount. In any event Mobil and Ohio strenuously object to allowance of interest on the principal. Briefs have been submitted which purport to show the impropriety of interest on a restitutory award.

While the matter received no explicit treatment in the opinion of June 29, 1960, an award of interest may be implied from the granting of plaintiffs' first motion for summary judgment against Mobil and Ohio at page eleven therein. That motion included a request for interest. The issue deserves a fuller treatment. I conclude that such interest should be allowed. The governing principle is well stated in Restatement, Restitution, Sec. 156 (1937):

> "... A person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if: ... (b) the value of the benefit can be ascertained by mathematical calculation from the terms of an agreement between the parties or by established market prices ..."

The comment to this section at page 620 notes the obligation to pay interest from the time when the money should have been paid. Our court of appeals cited the Restatement in an analogous case to support a similar award of interest. Natural Gas Pipeline Co. of America v. Harrington, 246 Fed. (2d) 915, 921 (5th Cir. 1957). This case is determinative of plaintiffs' right to recover interest on the excess payments, at least from February 1, 1957, the date of dissolution of the stay order. Natural Gas paid an increased price pursuant to an Oklahoma minimum price order. That order was invalidated by the United States Supreme Court; Natural Gas sued for recovery of excess payments. The court of appeals held that interest should accrue from the date the minimum price order was invalidated.

Okeechobee County, Fla. v. Nuveen, 145 Fed. (2d) 684, 687 (5th Cir. 1944), indicates the district courts are vested with considerable discretion in the awarding of interest damages upon restitutory sums. Considerations of fairness and traditional equitable principles are to guide the exercise of this discretion. Allowance of interest seems best to accord with these guide-lines in this instance. The cases cited by Mobil and Ohio have been considered. They too stress this discretionary role. This interest is allowed as a means of compensating plaintiffs' loss of use of their monies.

Additional interest difficulties remain. Plaintiffs and defendants are not in accord on the period for commencement of this interest. Plaintiffs say interest should run from the date the respective monthly payments were made by Transco to Mobil and Ohio. They have so computed interest in their form of judgment. Mobil and Ohio argue that such starting points are not consonant with the court's memorandum in June. They conclude from that opinion,

especially page eight, that they were entitled to collect, during the stay period, the contractual increases. Under the court's rationale, they declare, there could be no duty of restitution during that period. They cite page thirteen of the opinion as indicating the cause of action in restitution arose on February 1, 1957. Necessarily, the court is told, no interest can be claimed before that date, for no duty of restitution existed prior thereto.

Defendants' argument has considerable logical appeal. Yet, Mobil and Ohio have had the use of this money from the date of its receipt. Similarly, plaintiffs have been deprived of the use of such funds from the time these increased rates were reflected in Transco's charges to them. Equitable considerations compel the conclusion that interest should commence from the respective dates of Transco's overpayments to the defendants. Plaintiffs' motion for judgment so provides. Mississippi River Fuel Corp. v. Federal Power Commission, 281 Fed. (2d) 919 (D.C. Cir. 1960), supports this conclusion. The ruling of the Federal Power Commission in a similar interest question is therein approved. The Commission ordered ". . . interest at the rate of 6 per cent per annum from the date of receipt of such excess amounts to the date of refund." 21 F.P.C. 48, 53. Language in Natural Gas Pipeline Company of America v. Harrington, supra, buttresses this result. The factual situation of this case has been referred to, supra. The court of appeals granted interest from the date the minimum price order was held invalid. Interest before that date was declined because the recipient of increased prices had not received them due to its fault or volition. Here, however, as noted at page eighteen of my prior opinion, Mobil and Ohio actively sought and obtained the stay order. The excess charges were not of the windfall variety present in Harrington. They came

to Mobil and Ohio due to their own volition. They should pay interest on the funds withheld from the time of their receipt, not just from February 1, 1957.

There remains one other question with regard to interest. Plaintiffs have accrued interest prior to the rendition of the judgment and included such interest in the principal sum as interest damages. Then they provide in their tendered judgment that the amounts set forth in the judgment shall bear interest at the rate of 6% per annum. Defendants claim plaintiffs have thus figured the interest contrary to the rule that compound interest is not allowed in the absence of a contract providing therefor. Cherokee Nation v. United States, 270 U.S. 476 (1926), is said to be contrary. The Texas rule allegedly prevents this. McDaniel v. Miller, 317 S.W.(2d) 546, 549 (Ct.Civ.Apps.1958), is cited. The court therein held it to be improper to include interest as a part of the principal sum of the judgment and then allow the judgment to draw interest at the rate of 6% per annum. Plaintiffs' answer to Ohio's reply to its motion for judgment at pages six and seven admits McDaniel is contrary to their view. They cite earlier cases from Texas as presenting a different view; McDaniel is "wrong", plaintiffs declare. It is clear that this is a matter to be determined by state law. T. & M. Transport Co. v. Shattuck Chemical Co., 158 Fed.(2d) 909 (10th Cir. 1947); Herd & Co. v. Krawill Machinery Corp., 256 Fed.(2d) 946 (4th Cir. 1958), aff'd 3 L.Ed.(2d) 820 (1959).

The Texas cases are rather confusing on this matter. On the one hand, as indicated supra, McDaniel denies interest on that portion of the judgment which constitutes interest on the principal. Plaintiffs cite five earlier cases which they say are contrary to McDaniel. None of these five are cited in McDaniel; indeed, the Texas Court of Civil Appeals cited no authority for its holding therein.

Frazier v. Campbell, 5 Tex. 275 (1849), is said by plaintiffs to first establish the law in Texas on this issue. It is true that the Supreme Court of Texas allowed interest on a judgment containing interest; the case, however, may be distinguishable in that the instrument sued upon specified what interest the principal was to bear. In this case the interest granted herein on the principal was not consensual in origin but judicially allowed. Miner v. Paris Exchange Bank, 53 Tex. 559 (1880), alludes to Frazier, supra, but it is inapposite, for it concerns usury, not interest on judgments. The remaining cases cited by plaintiffs allowed interest on that portion of the judgment which constituted interest. On first reading they seem to conflict with McDaniel. All however involve consensual or contractual interest on a principal. Like Frazier, they concern instruments carrying in their provisions interest. McDaniel is more analogous to the present situation, for it dealt with a judgment for judicially-imposed interest. McDaniel must guide my decision. Hence, interest will be granted only on that portion of the judgment which constitutes principal and not interest.

Mobil and Ohio have further objections to the tendered form of judgment. The first paragraph following the figures on page three of the proposed judgment grants judgment against plaintiffs and in favor of Transco on plaintiffs' suit against Transco, but awards court costs thereon to Transco against Mobil and Ohio. As to that such costs should be taxed against plaintiffs. Mobil properly objects to being taxed for plaintiffs' failure in that respect.

Said judgment as drawn constitutes a taxation of costs jointly against Mobil and Ohio. The causes of action against the two were different. The only common fact was that both sold gas to Transco. No basis appears for joint

taxation of costs against Mobil and Ohio. Hence, costs will be taxed separately against Ohio and Mobil. The costs of the fourth motion of Transco will be taxed separately against Ohio and Mobil.

A notice of appeal was included in the form of judgment. Mobil and Ohio object thereto, preferring to give their own. The notice of appeal will be deleted from the proposed judgment.

I now summarize the conclusions arrived at herein. Transco's alternative motion for severance will be denied, while its fourth motion for summary judgment will be granted. Interest on the principal sum involved in said fourth motion may accrue from the time of the respective overpayments by Transco to Mobil and Ohio. The form of judgment next tendered must reflect this disposition of the fourth motion. Plaintiffs' proposed form of judgment properly contains interest on the principal computed from a series of beginning dates arising prior to February 1, 1957. Interest on the judgment itself may be computed only on that portion of the judgment which constitutes principal. For example, plaintiffs' interest figure of $250,314.84 may not itself bear interest. Costs will be taxed separately against Mobil and Ohio. Plaintiffs will bear the costs of their failure to obtain judgment against Transco. No notice of appeal will be included.

The clerk will notify counsel to draft and submit appropriate judgment.

JOE INGRAHAM
United States District Judge

Reported at 201 F.S. 679

NATURAL GAS ACT OF 1938, 52 STAT. 821 AS AMENDED

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations,

or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas

company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charges, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That*

the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. §717d]

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U. S. C. 717o (1946)]

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person,

State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so

to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). [52 Stat. 831 (1938); 15 U.S.C. §717r]

SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District Court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this act or any rule, regulation, or order thereunder, and upon

a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Upon application of the Commission the district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this act or any rule, regulation, or order of the Commission thereunder.

(c) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission. [52 Stat. 832 (1938); 15 U.S.C. §717s]

SEC. 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce

any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in [former] sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this act. [52 Stat. 833 (1938); 15 U.S.C. §717u]

From Federal Power Commission Rules of Practice and Procedure

1.6 Complaints and orders to show cause

(a) *Informal complaints.* (1) *Form.* Informal complaints may be made by letter or other writing, and will be filed as received. Matters informally presented will, if their nature so warrants, be taken up by correspondence or conference with the party or parties complained of in an endeavor to bring about satisfaction of the complaint without formal hearing.

(2) *Substance.* No form of informal complaint is prescribed but in substance it should contain the name and address of complainant, the name and address of the party against whom the complaint is made, and a brief statement of the facts forming the basis of such complaint. Although

the filing of an informal complaint is without prejudice to complainant's right to file a formal complaint, only formal complaints submitted and prosecuted in the manner prescribed in this section will initiate formal proceedings or make complainant a party to any proceedings already initiated, and only formal complaints will be admitted in the record of formal proceedings. It is desirable that the informal complaint be accompanied by sufficient copies to enable the Commission to transmit one to each party named and to each interested State commission, and retain one for its own use, and it may be accompanied by supporting papers.

(b) *Formal complaints* — (1) *Form.* Formal complaints shall be in writing and under oath and shall conform to the requirements of §§ 1.15 and 1.16. In such complaints there shall be stated the names and addresses of all parties, complainant and defendant, in full without abbreviations, with the name and address of each complainant's attorney, if any.

(2) *Substance.* Formal complaints shall be so drawn as fully and completely to advise the parties defendant and the Commission of the facts constituting the grounds of the complaint, the provisions of statutes, rules, regulations, and orders, relied upon, involving authority of the Commission, the injury complained of, and the relief sought.

(c) *Joinder.* Two or more grounds of complaint involving the same purposes, subject, or state of facts, may be included in one complaint, but should be separately stated and numbered; and two or more complainants may join in one complaint if their respective causes of complaint are against the same defendant or defendants, and involve substantially the same purposes and subject, and a like state of facts.

(d). *Orders to show cause.* Whenever the Commission desires to institute a proceeding against any person under statutory or other authority, the Commission may commence such action by an order to show cause setting forth the grounds for such action. Said order will contain a statement of the particulars and matters concerning which the Commission is inquiring, which shall be deemed to be tentative and for the purpose of framing issues for consideration and decision by the Commission in the proceeding, and the order will require that the respondent named respond orally, or in writing (as provided in § 1.9 (c)), or both.

1.7 Petitions

(a) *General.* Petitions for relief under any statute or other authority delegated to the Commission shall be in writing and under oath, shall state clearly and concisely the petitioner's grounds of interest in the subject matter, the facts relied upon, and the relief sought, and shall cite by appropriate reference the statutory provision or other authority relied upon for relief and shall conform to the requirements of §§ 1.15 and 1.16.

(b) *For issuance, amendment or repeal of rules.* A petition for the issuance, amendment, or repeal of a rule by the Commission shall set forth clearly and concisely petitioner's interest in the subject matter, the specific rule, amendment, or repeal requested, and cite by appropriate reference the statutory provision or other authority therefor. Such petition shall set forth the purpose of, and the facts claimed to constitute the grounds requiring, such rule, amendment, or repeal, and shall conform to the requirements of §§ 1.15 and 1.16. Petitions for the issuance or amendment of a rule shall incorporate the proposed rule or amendment.

(c) *For declaratory orders.* Petitions for the issuance, in the discretion of the Commission, of a declaratory order to terminate a controversy or remove uncertainty, shall state clearly and concisely the controversy or uncertainty which is the subject of the petition, shall cite the statutory provision or other authority involved, shall include a complete statement of the facts and grounds prompting the petition, together with a full disclosure of petitioner's interest, and shall conform to the requirements of §§ 1.15 and 1.16.

* * * * * *

1.9 Answers

(a) *Answers to formal complaints and petitions.* Answers to formal complaints and petitions, other than petitions to intervene, shall be filed with the Commission within 30 days after the date of service, unless for cause the Commission with or without motion shall prescribe a different time, but in no case shall answer be required in less than 10 days after the date of service. Any defendant failing to file answer within such period shall be deemed in default, and all relevant basic facts stated in such complaint or petition may be deemed admitted. All answers shall be in writing and under oath, and so drawn as fully and completely to advise the parties and the Commission as to the nature of the defense. They shall admit or deny specifically and in detail each material allegation of the pleading answered, and state clearly and concisely the facts and matters of law relied upon. They shall conform to the requirements of §§ 1.15 to 1.17, inclusive.

(b) *Answers to petitions to intervene.* See § 1.8(c).

(c) *Answers to orders to show cause.* Any person upon whom an order to show cause has been served under § 1.6 shall, if directed so to do, respond to the same by filing

within the time specified in said order an aswer in writing and under oath. Such answer shall be drawn so as specifically to admit or deny the allegations or charges which may be made in said order, set forth the facts upon which respondent relies, and state concisely the matters of law relied upon. Mere general denials of the allegations of said order unsupported by specific facts upon which respondent relies will not be considered as complying with the order and may be deemed a basis for entry of a final order without hearing, unless otherwise required by statute, on the ground that the response has raised no issues requiring a hearing or further proceedings. Any respondent failing to file answer within the time allowed shall be deemed in default, and all relevant facts stated in said order to show cause may be deemed admitted. Such answer shall otherwise conform to the requirements of §§ 1.15 to 1.17, inclusive.

(d) *Answer to motions.* See § 1.12(c).

(e) *Defendants seeking affirmative relief.* Defendants seeking relief against other parties in a proceeding by reason of the presence of common questions of law or fact shall set forth in their answer the facts constituting the grounds of complaint, the provisions of the statutes, rules, regulations, or orders relied upon, the injury complained of, and the relief sought. The answer shall in all other respects conform to the requirements of this section and §§ 1.15 to 1.17, inclusive.

(f) *Replies to defendants seeking affirmative relief.* Unless otherwise ordered by the Commission, replies to answers seeking affirmative relief must be filed and served within 15 days after the service of the answer, but not later than 5 days prior to the date set for the commencement of the hearing, if any. They shall in all other respects conform to the requirements of §§ 1.15 to 1.17, inclusive.

(g) *Answers to amendments of pleadings.* Any party to a proceedings or staff counsel may file an answer to any amendment, modification or supplement to an application complaint, petition or other pleading. If made, answers shall be filed within 15 days after the date of service of the amendment, modification or supplement, unless for cause the Commission or presiding officer with or without motion shall prescribe a different time. They shall in all other respects conform to the requirements of §§ 1.15 to 1.17, inclusive.

(h) *Satisfaction of complaints.* If the defendant satisfies a formal complaint either before or after answering, a statement to that effect signed by the opposing parties shall be filed, setting forth when and how the complaint has been satisfied and requesting dismissal. Such statements shall be served upon all parties, and the original copies of such statements, when filed, shall show service on all parties, and in other respects shall conform to the requirements of §§ 1.15 to 1.17, inclusive; all additional copies shall be conformed thereto.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 300

SOCONY MOBIL OIL COMPANY, INC.,
Petitioner

v.

BROOKLYN UNION GAS COMPANY, ET AL,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

W. M. STREETMAN
F. L. ANDREWS
LEWIS T. SWEET, JR.
2200 Gulf Building
Houston 2, Texas
Counsel For Respondents

September 6, 1962

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

The three questions presented by Socony Mobil Oil Company ("Mobil") on page 3 of its petition are not in fact raised by the record in this case for the following reasons:

1. Mobil's first question as to whether, under Section 4 of the Natural Gas Act, a rate not filed with the Federal Power Commission is invalid and unlawful is not present

in this case. The question here involved is the unlawfulness of a *change* in rate by a natural gas company without having filed notice of the increase with the Federal Power Commission as required by Section 4(d) of the Natural Gas Act and Order No. 174-A of the Federal Power Commission.

2. Mobil's second question, whether the Federal Power Commission may by regulation exercise the power to establish rates, is nothing more than an attempt to relitigate the validity of Order No. 174-A of the Federal Power Commission, which it had unsuccessfully attacked in the case in which the stay order was issued, *Magnolia Petroleum Company v. Federal Power Commission*, 236 F. 2d 785 (C.A. 5, 1956) cert. denied 352 U.S. 968, and that case as to Mobil is res judicata.

3. Mobil's third question assumes that the court below exercised "* * * power primarily and exclusively given by the Natural Gas Act to the Federal Power Commission to determine lawfulness, i.e., justness and reasonableness, of such contract price, * * *". (Mobil's Petition, p. 3). That is not the fact. District Court said:

> "The court may decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company, S.D. Tex., 1954, 130 Fed. Supp. 890. By finding the lawful rates as established by order of the Federal Power Commission, the court is not fixing any just or reasonable rate or granting reparations." (Mobil's Appendix, p. 21a, R. 661, 662).

The Court of Appeals for the Fifth Circuit said:

> "As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations." (Mobil's Appendix, p. 4a, R. 837)

On page 8 of its application Mobil states that its "* * * contention that contract rates collected could not be attacked sprang not from the stay order, but solely from the lack of power of both courts below to determine lawfulness of such rates * * *." Therefore, there is but one narrow question before the court: May an independent producer of natural gas, by the simple expedient of not filing rate shedules and notice of increased rates with the Federal Power Commission, escape the prohibition contained in Section 4(d) of the Natural Gas Act and Federal Power Commission Order No. 174-A against changes in rates without filling such schedules and thereafter retain the amounts collected pursuant to the unfiled rate increase?

STATEMENT

This is a companion case to No. 303, *Marathon Oil Company v. Brooklyn Union Gas Company*, et al.; No. 339, *Transcontinental Gas Pipeline Corp., v. Brooklyn Union Gas Company, et al*; and No. 344, *Brooklyn Union Gas Company, et al. v. Transcontinental Gas Pipeline Corp.*, all filed at this term. The four cases were a single case in the District Court and, although separately docketed, were considered and decided together by the Court of Appeals and are before this Court on a single record.

Respondent cannot accept the statement of the case by Mobil in its petition for, by design or accident, it misstates

or misinterprets the facts and is misleading. Respondents adopt the clear and succinct statement of the facts set forth in the opinion of the District Court of June 29, 1960, Petitioner's Appendix, page 12, which was in effect adopted by the Court of Appeals, Petitioner's Appendix, page 2. For the convenience of the Court, it is reprinted here:

"These consolidated proceedings consist of actions in which plaintiffs, who are distributors of natural gas in eastern seaboard areas, seek restitution of monies paid by defendant Transcontinental Gas Pipe Line Corporation (Transco) to defendants Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio) through increases in price for natural gas sold and delivered to Transco. The case is submitted upon the pleadings, affidavits, and motions for summary judgment of all parties concerned.

"Transco operates under certificate from the Federal Power Commission an interstate natural gas pipe line from Texas to New York. Prior to June 7, 1954, Transco entered into separate natural gas purchase and sales contracts with Mobil and Ohio, covering natural gas from the West Gueydan Field in Vermillion Parish, Louisiana, and from the North Markham-North Bay City Field in Matagorda County, Texas, respectively. The Mobil contract included a 'favored nations' clause providing for increases in price, while the Ohio contract contained a provision for periodic and tax reimbursement price increases. Prior to June 7, 1954, Transco commenced purchasing gas under these contracts, commingling it with other gas in its line and delivering it to customers, including plaintiffs, along its pipe line. Mobil's contract price on June 7, 1954, was 9.79150 cents per m.c.f., while Ohio's contract price on said date was 8.730376 cents per m.c.f.

"On June 7, 1954, the Supreme Court of the United States held in *Phillips Petroleum Co. v. Wisconsin*, 1954, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, that Phillips, a natural gas producer and gatherer, was a 'natural gas Company' within the meaning of the term as defined in the Natural Gas Act, 15 *U. S. C. A.*, Sec. 717, et seq. Both Mobil and Ohio were and are engaged in the business of producing, gathering, and selling natural gas in interstate commerce. The Phillips decision is applicable to both of them. Thus the rates at which they sell natural gas are subject to regulation by the Federal Power Commission.

"On July 16, 1954, the Federal Power Commission issued its Order No. 174, 19 F.R. 4534. Among other things, this order required every independent producer engaged in the interstate transportation or sale of natural gas since June 7, 1954, to file with the Commission copies of rate schedules setting forth all rates and charges for the sale of natural gas which were in effect on June 7, 1954. The order further provided that no change could be made in these June 7, 1954 rates without first giving 30 days' notice of such change pursuant to Section 4(d) of the Natural Gas Act. Order No. 174-A of August 6, 1954, 19 F.R. 5081, and succeeding amendments, simplified and clarified the procedures by which producers apply for a certificate of public convenience and necessity but did not change the foregoing rate requirements.

"Pursuant to Section 19(b) of the Natural Gas Act, Mobil and Ohio each filed a petition for review of Order No. 174-A in the United States Court of Appeals for the Fifth Circuit, questioning whether the Commission was empowered to regulate the price increase provisions of their contracts with Transco as changes in rate. These petitions

sought a stay of that order concerning operations of Mobil and Ohio, including their contracts with Transco. In November 1954 a stay of Order No. 174-A as to Mobil and Ohio was issued by the Court of Appeals. Later, on June 30, 1956, the petitions for review were dismissed, though certificate of the opinion and judgment to the Federal Power Commission was stayed by the court to permit the filing of applications for certiorari in the Supreme Court of the United States, which applications were denied on January 14, 1957. After denial of certiorari, the stay orders were dissolved on February 1, 1957. *Magnolia Petroleum Company, et al v. Federal Power Commission*, 5 Cir., 1956, 236 Fed. 2d 785.

"Only after denial of certiorari did Mobil and Ohio file their Transco contracts with the Federal Power Commission as rate schedules or otherwise. During the pendency of the stay order from February 1, 1955, through January 31, 1957, charges were made to Transco by both Mobil and Ohio in excess of the rates which were in effect on June 7, 1954. Though made pursuant to the price increase provisions of the Transco contracts, such charges were made without giving 30 days' notice thereof to the Federal Power Commission and to the public in accordance with the provisions of Section 4(d) of the Natural Gas Act and as required by Order No. 174-A. The amounts involved in this controversy are the payments in excess of the rates in effect on June 7, 1954, made by Transco to Mobil and Ohio during the period from February 1, 1955, through January 31, 1957.

"On November 26, 1954, Transco filed rate schedules with the Federal Power Commission providing for increases in the rates to be charged by Transco to plaintiffs and other

public utility and industrial customers for natural gas service. Another filing seeking additional increases was made by Transco on January 20, 1955. The Federal Power Commission consolidated these matters and commenced hearings on June 20, 1955, which continued for some months. Meanwhile the rates filed on November 26, 1954, went into effect on February 1, 1955. With matters in this status, each plaintiff entered into an agreement with Transco on October 5, 1955, for the complete settlement of Transco's rate proceedings before the Federal Power Commission, which was made a part of the record of the proceedings before the Commission.

"On November 7, 1955, the Federal Power Commission issued an order approving the proposed rate settlement. Among other things this order contained the following specific provision:

" 'In the event any of the suppliers of Transco whose rates are currently in effect under an undertaking or under bond, or whose rates are currently being charged under court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of said refund attributable to natural gas purchased from said supplying company or companies by Transco, after Transco's increased rates were permitted to become effective to cover such increased cost of gas, shall be refunded to Transco's utility customers within 60 days after receipt of such refund by Transco * * *.'

"Both the agreement and the order provide a detailed method of computing the refund to be paid to each of Transco's utility customers."

In the trial court, each of the parties filed motions for summary judgment. The trial court's memorandum opinion

of June 29, 1960, recognized the Respondents' position as assignees of Transco's cause of action and as the real parties in interest. The Court further held that Respondents were entitled to recover from Mobil and Ohio on the merits of the controversy, because the only effective lawful rates from June 7, 1954, until Mobil and Ohio received approval of different rates from the Federal Power Commission were the contract rates in effect June 7, 1954. In view of this holding, the Court did not reach the question of whether Respondents stated an independent claim against Transco, saying: "Since plaintiffs can recover against Mobil and Ohio, it is unnecessary to determine whether they state an independent claim against Transco arising out of the refund provision of the settlement agreements and order." (R. 665).

The trial court entered judgment that Mobil and Ohio refund the overcharges to Respondents and that Respondents take nothing from Transco.

The Court of Appeals unanimously affirmed the judgment of the trial court, and in substance adopted the opinion of the District Judge as its own.

I.

REASONS FOR NOT GRANTING THE WRIT

Petitioner's application is based upon the misconceived idea that the court below administratively determined Petitioner's rate during the pendency of the stay order and upon the fallacious argument that, because it had not filed any rate schedule with the Federal Power Commission, Petitioner could then lawfully enforce escalated contract rate increases without filing notice of such increases with the Federal Power Commission.

Neither court below took any such administrative action for, as stated by the Court of Appeals:

> "As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations." (Petitioner's Appendix p. 4a, R. 837).

It is equally clear that under the Natural Gas Act and Order 174-A the only lawful rate of an independent producer of natural gas from June 7, 1954 until the filing of a different rate with the Federal Power Commission was the contract rate in effect on June 7, 1954. This is true even though the contract rate was unfiled. Any change provided for in the contract, whether filed or unfiled, by virtue of a "favored nations" or "escalation" clause or otherwise, constituted a rate change which under the Natural Gas Act and the applicable regulations of the Federal Power Commission is forbidden in the absence of compliance with the filing and notice provisions of the Act and regulations. *Natural Gas Pipe Line Co. of America v. Harrington*, 246 F. 2d 915 (C.A. 5, 1957) cert. denied 356 U. S. 957; *Bel Oil Corp. v. Federal Power Commission*, 225 F. 2d 548 (C.A. 5, 1958) cert. denied 358 U.S. 804; *Episcopal Theological Seminary v. Federal Power Commission*, 269 F. 2d 228 (C.A. D.C., 1959) cert. denied 361 U.S. 895; *Cities Service Gas Producing Company v. Federal Power Commission*, 233 F. 2d 726 (C.A. 10 1956) cert. denied 352 U.S. 911; *Natural Gas Pipe Line Co. v. Federal Power Commission*, 253 F. 2d 3 (C.A. 3 1958) cert. denied 357 U.S. 927.

The courts below did not hold, as stated by Petitioner on page 11, "that a producer's failure to file a contract with attendant rate invalidity, created a category and area in which the courts could determine lawfulness and adjudicate the consequences without impinging upon power exclusively given the Commission by the Act to determine lawfulness." As previously pointed out, the courts merely determined what was the effective lawful rate in the absence of filing and giving notice of a changed rate pursuant to Order No. 174-A and Section 4(d) of the Natural Gas Act.

Petitioner also confuses "effective lawful rate" and "just and reasonable rates." They are not necessarily the same rate unless the Commission has been given the opportunity to exercise its functions under Section 4(d) of the Act. Here Mobil deliberately sought to evade the provisions of Section 4(d) and Order No. 174-A by litigation and the stay order, and now, with the litigation lost and the stay order expired, seeks to retain excess unlawful rates collected during the life of the stay order. To follow Mobil's position would be to hold: (a) that the contract rate in effect on June 7, 1954 may be changed without filing under Section 4(d); and (b) that the stay order administratively determined rates during its pendency, a power denied to the courts as recognized by both courts below. (Petitioner's Appendix, pp. 4a, 6a, 7a and 21a, R. 837, 839, 840, 662.)

The decision below does not, as suggested by Petitioner (Mobil's Petition p. 11), present "broad and highly important questions of construction of the Act and the substitution of judicial dictate for the administrative determination stipulated by the statute, contrary to the decisions of this Court," because, so far as we know or can determine

only Mobil and Ohio, the Petitioners in Nos. 300 and 303, proceeded to collect increased contract rates under stay orders without filing the increases with the Federal Power Commission and no other independent producers are known to be involved. All independent producers are now operating under the provisions of Order No. 174-A as well as Section 4(d) af the Natural Gas Act, and the exact question in these cases can never again arise.

Petitioner places no reliance on the stay orders to protect it in retaining its increased rates on page 8 of its petition stating that:

> "Mobil's contention that contract rates collected could not be attacked sprang not from the stay order but solely from the lack of power of both courts below to determine lawfulness of such rates, a power granted by the Act exclusively to the Commission."

And on page 10,

> "Realistically evaluated its decision demonstrates the stay order affected nothing, protected nothing."

Since Petitioner places no reliance on the stay order, its position must be that so long as an independent producer's rates are unfiled, even now, its contract rates, however escalated, can be lawfully charged and collected in utter disregard of Order No. 174-A and Section 4(d) of the Natural Gas Act.

Even Ohio recognizes and admits that without the stay order Mobil and Ohio would not have any semblance of a right to rates in excess of those in effect on June 7, 1954. As Ohio said at page 6 of its Reply Brief in the trial court:

"Of course, if the Court stay had not been granted, and if Ohio had not made any rate filing and had not given the notice required by Order No. 174-A, the June 7, 1954 price would have been and would have remained the lawful price."

II

THE DECISION BELOW IS CLEARLY CORRECT

As previously stated an unbroken line of cases in various circuits supports the decision by both courts below that the only lawful rate from June 7, 1954, until Mobil received approval from the Federal Power Commission of a different rate was the contract rate in effect on June 7, 1954. This is true even though the contract was unfiled. Any change provided for in the contract, whether filed or unfiled, by virtue of a "favored nations" or "escalation" clause, or otherwise, constitutes a change in rates, which is forbidden in the absence of filing with the Commission. *Natural Gas Pipe Line Co. of America v. Harrington; Bel Oil Corp. v. Federal Power Commission; Cities Service Gas Producing Co. v. Federal Power Commission; Amerada Petroleum Corp. v. Federal Power Commission; Episcopal Theological Seminary v. Federal Power Commission; Natural Gas Pipeline Co. v. Federal Power Commission;* all supra.

The cited cases point out that companies such as Mobil were under Commission jurisdiction from the inception of the Natural Gas Act, but that neither the Commission nor the companies recognized that fact until the decision of this Court in the *Phillips'* case on June 7, 1954. The Commission was faced with the necessity of a beginning date, and in order to prevent inequitable retroactive adjustments, the Commission and the courts have applied that date as the cut-off date of price changes without filing.

Both courts below held that the stay order issued by the Court of Appeals did not adjudicate any rights to any specific rates, but merely preserved the status quo. Admittedly, it temporarily relieved Mobil of the necessity of filing its contracts with the Commission.

When the stay order was dissolved, a duty of restitution arose. *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145; *Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co.*, 80 F. 2d 32 (C.A. 8, 1935) cert. denied 297 U.S. 715; *Cleveland v. Tufts*, 69 Tex. 580, 7 S.W. 72 (1888). Mobil was then under a duty to restore the amounts in excess of the June 7, 1954 rate collected during the pendency of the stay.

But aside from the fact that a stay order does not adjudicate rights, but merely preserves the status quo, *Scripps Howard Radio v. Federal Communications Commission*, 316 U.S. 4, Mobil now states that it places no reliance on the stay order (Mobil's Petition, pp. 8 and 10). This makes the task of this Court even easier.

Mobil would ask this Court to say that no court, including the courts below, has the power to determine what was the effective lawful rate at any given time. This could only mean that courts are without power to determine the rights of parties to contracts and that a person who is overcharged must look elsewhere than to the courts for relief. The very origin of courts of law was based largely upon an effort to eliminate the necessity for self help in such situations and the chaotic consequences which flowed therefrom.

The fact that courts can recognize, determine, and give effect to the lawful rate at any given time is also made apparent by the decision of this Court in *United Gas Pipe*

Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 347, when the Court said:

> "Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments."

III

THERE IS NO ISSUE OF GENERAL IMPORTANCE NECESSARY FOR THIS COURT TO CONSIDER

By its Point I, Mobil atempts to reduce Sections 4(c) and 4(d) of the Natural Gas Act to "notice sections only", with Section 4(c) requiring filing of contracts and Section 4(d) prohibiting change only in contracts "previously filed." It is urged that the antecedent of "such" in Section 4(d)'s prohibition of change in any "such rate" is "the rate already on file by Section 4(c)." This is clearly erroneous.

Section 4(c) requires the filing of "*schedules*" showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission." (Italics supplied.) The reference in Section 4(d) is, therefore, to "such" rate for any "sale subject to the jurisdiction of the Commission." If the reference had been to "previously filed rates or contracts," Section 4(d) would have used the word "schedule". This is shown by the fact that Section 4(c) requires filing "schedules" showing rates, Section 4(d) requires filing "new schedules," and Section 4(e) concerns Commission action with respect to a "new schedule." Nowhere does Section 4 refer to the filing of "rates."

All of the courts of appeals cases previously cited establish that the rate initially filed with the Commission must be the rate in effect on June 7, 1954, even though, in some cases, price increases called for in the contract had already gone into effect prior to filing. If the prohibition against change applied only to "previously filed rates," then it would not have been necessary for the companies to file at the June 7, 1954, level, but they could have filed at the new level called for by the contract.

Mobil's reliance upon *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, and *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, is misplaced, as neither supports Mobil's construction of the Act. *Mobile* involved an attempt by United to unilaterally change its contract with Mobile, which had been filed with the Commission. The Court held that Section 4(d) did not give United the power to change its contract unilaterally, and did not create a method, apart from the contract, of establishing new rate schedules. After summarizing the regulatory scheme, the Court said at 350 U.S. 343:

> "No more is necessary to give full meaning to all of the provisions of the Act: consistent with this, §4(d) means simply that *no* change—neither a unilateral change to an ex parte rate nor an agreed-upon change to a contract—can be made by a natural gas company without the proper notice to the Commission."

In *Memphis*, the Court reaffirmed its holding in *Mobile*, but said that under a different contract which provided for the sale of gas at the "going" rate, United could file new schedules providing for rates which had not specifi-

cally been agreed upon by United's customers. In *Memphis*, unlike *Mobile*, United had complied with all of the duties imposed by the Act. The holding below is squarely in line with this Court's decisions in *Mobile* and *Memphis*. Mobil's argument that, despite the stay, the Commission had "ample power to enforce and compel filing" (Mobil's petition, p. 14) is patently ridiculous. When by its stay the Court of Appeals for the Fifth Circuit had relieved Mobil from the requirement of filing pending judicial review of Order No. 174-A, what court, under Section 20 or 22 of the Act, would have disregarded the stay and ordered Mobil to file? Contrary to Mobil's statement that Order No. 174-A is "a procedural regulation applicable only after filing," Order No 174-A prescribes the procedure and time for filing, and throughout this case all parties have agreed that under the stay Mobil and Ohio did not have to file.

Mobil also tries to conjur the word "lawful" into a term of art under the Act, with no meaning other than any rates which are 'just and reasonable." On the contrary, the terms are not synonymous. As this Court said in *Montana-Dakota*, 341 U.S. at 251: "We hold that the right to a reasonable rate is the right to the rate which the Comission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable.

According to Mobil's definition, any rate that is just and reasonable and not preferential is lawful, whether filed or unfiled. In this case, there is no issue with respect to the justness and reasonablenes of the rate Mobil collected; that is totally irrelevant. Even assuming they were just and reasonable, the increased prices were unlawful because unfiled.

The Commission might have approved increased rates, but it was never given the opportunity to act because there was no filing.

In the *Mobile* case there was no question with respect to whether the rates were just and reasonable, and the Commission had erroneously permitted the increased rates to become effective. This Court said that the rates were "unlawfully collected," without discussing whether they were just and reasonable. 350 U.S. at 347. There the rates were unlawful because of the absence of contractual authorization for the increase. Here the rates were unlawful because of the absence of filing with the Commission. And Mobil expressly states that it does not rely on the stay order's relieving it from the obligation to file as protection for collection of the increased rates.

Mobil also manufactures a conflict between the opinion below and the case of *Natural Gas Pipe Line Co. of America v. Harrington*, 246 F. 2d 915 (C.A. 5, 1957), cert. den. 356 U.S. 957, and *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F. 2d 380 (C.A. 9, 1953). In *Harrington* the Court held that the contract rate, even though unfiled, was the only "lawful" rate (not "just and reasonable" rate) until changed by order of the Commission. Without Commission approval, the rate could not be changed. (The subsequent Fifth Circuit case of *Bel Oil Corp. v. Federal Power Commission*, 255 F. 2d 548 (C.A. 5, 1958), cert. den., 358 U.S. 804, established that even changes in rate provided for in the contract are, subsequent to June 7, 1954, "rate changes" subject to the prohibition of Section 4(d).) The court stated it could not look into the past and retroactively fix a "just, reasonable, and lawful rate" different from that established as the lawful rate under the Act. And neither did the court attempt to

fix a "just, reasonable, and lawful rate" in this case. It merely recognized and enforced the rate established under the Act as the only lawful rate. There is no conflict with *Harrington.*

The *Interstate Natural Gas* case was not a rate case, but an action for damages for refusal by the defendant to transport in its pipeline, operating under certificate from the Commission, the gas belonging to the plaintiff. The question of rates arose only because the plaintiff, in an effort to avoid the defense of failure to exhaust administrative remedies, contended that the Commission did not have jurisdiction because the defendant had not filed rate schedules. The court held that there were rate schedules on file, and even if there had not been, the Commission would have had jurisdition. The case is not relevant here, except to the extent that it holds that Commission jurisdiction cannot be avoided merely by failure to file rate schedules. There is no conflict with *Interstate.*

The misinterpretation of Section 4(d) by Mobil and the absence of the alleged conflict of decision demonstrate that Mobil has not raised any issue of importance under its Point I.

IV

THERE IS NO FEDERAL QUESTION OF IMPORTANCE AND NO CONFLICT OF DECISIONS

In its Point II, Mobil declares that there is presented a federal question of importance, but the question does not in fact exist, because the point is based upon a misstatement of the decision below. Mobil states that the court below disregarded Mobil's contract with Transco, changed the

contract, and at the same time, somehow, both vested the Commission with authority to fix rates and usurped powers granted solely to the Commission.

In fact, the court below recognized and enforced the contract rate in the only way available to it under the law. The court enforced the contract rate in effect on June 7, 1954. Under all of the relevant decided cases, the contract rate as of June 7, 1954, was the rate which Mobil was initially required to file. In fact, when Mobil eventually filed its rate schedule in 1957, the filing was accepted by the Commission at the rate level in effect on June 7, 1954. (R. 585). Subsequent price increases, even though provided for in the contract, constituted changes in rates which the court could not enforce because they were prohibited by Setion 4(d). *Bel Oil Corp. v. Federal Power Commission; Cities Service Gas Producing Co. v. Federal Power Commission; Episcopal Theological Seminary v. Federal Power Commission;* all *supra.* It is true that the rates are initially set by contract, but even rate changes contractually provided for may not be freely put into effect. The restrictions and limitations of the Act must be satisfied first.

The court below did not, as Mobil states, hold that Order No. 174-A fixes and makes rates, but it did hold that Section 4(d) prohibits changes in rates without filing. Mobil can raise a question only by ignoring the fact that the court below considered Section 4(d) of the Act. When Section 4(d) is raised, Mobil's question falls.

The holding in *Magnolia Petroleum Co. v. Federal Power Commission,* 236 F. 2d 785 (C.A. 5, 1956) cert. denied 352 U.S. 968, the case in which the stay was granted, is declared by Mobil to be in conflict with the decisions below. No conflict with that case exists, and the court there an-

ticipated this consequence of its decision. In this case the court did not hold that Order No. 174-A was a "self-executing adjudicatory order making and establishing rates," but is completely in harmony with the *Magnolia* case, where the Court said that if Mobil was subject to Commission jurisdiction and Order No. 174-A, it was not by reason of anything contained in that order, but because Mobil's operations were such as to bring it under Section 4 of the Natural Gas Act. Mobil has done nothing to take itself out from under the Act and is subject to Section 4(d) requirements.

The court below is not in conflict with the decision in *Willmut Gas & Oil Co. v. Federal Power Commission*, 294 F. 2d 245 (C.A. D.C., 1961), cert. denied 368 U.S. 975, because that case is irrelevant. It merely held that the Commission could not refuse to accept for filing new rate schedules permitted by the Act merely because there were already on file previous schedules still undisposed of.

By letter of August 6, 1962, counsel for the Petitioner advised the Clerk of this Court that he had discovered the case of *H. L. Hunt, et al v. Federal Power Commission*, decided by the Fifth Circuit on July 19, 1962. He stated that he believed the *Hunt* case supported his Point II and that it presented an intra-circuit conflict. He invited the Respondents to comment upon the case because he will discuss it in his reply brief.

In *Hunt* the Commission erroneouly denied the producers the right to file notice of increases under Section 4. Here the Commission invited the producers to exercise their right to file notice of increased rates under Section 4. Mobil did not accept the invitation, but instead sought a stay order as a means of ignoring Commission jurisdiction and the provisions of Section 4(d) of the Act.

Since Mobil has misstated the decision below, it is apparent that the question based on that misstatement does not in fact exist, and that no conflict of decisions in fact exists.

V

MOBIL'S POINT III IS IRRELEVANT

Mobil's Point III consists of a discussion of the courts' lack of jurisdiction under the Natural Gas Act to award reparations for past unjust and unreasonable rates, and the point is, therefore, completely and totally irrelevant to the case before this Court.

Nowhere did Respondents allege, and nowhere did either court below hold, that the rates collected were unjust and unreasonable. Nowhere did the Respondents seek, and nowhere did either court below award, judgment for the difference between the rate collected and what was considered to be a just and reasonable rate. This is a case, not of reparations, but of restitution. Therefore, none of the cases cited by Mobil require any discussion here.

Mobil argues that the decision below creates a form of jurisdictional wasteland in which "courts could move to exercise the primary jurisdiction of the Commission," but rather than demonstrating this contention discusses the irrelevant subject of reparations. In fact, the position that Mobil is urging would, if upheld, itself create a wasteland inhabited, not by the courts, but by natural gas companies. Although Mobil allegedly places no reliance on the stay order, by means of the stay Mobil would have successfully avoided Commission jurisdiction for over two years, with complete freedom to increase its prices without scrutiny or restraint by the Commission, and would therefore be immune to all attempts by its customers to recover the

overcharges. Certainly neither the Natural Gas Act, the decisions under the Act, nor the stay issued by the Fifth Circuit were ever intended to produce such a result.

CONCLUSION

Respondents respectfully submit that this case involves only one simple question - the effect of the stay order issued by the Court of Appeals for the Fifth Circuit. In the absence of the stay, there is no question but that Mobil would have had to file its rate schedules and file new schedules seeking price changes, or else have faced severe criminal penalties for failure to file. Although Mobil states that it does not rely on the stay, if the stay were removed from this case we submit that Mobil would not be contending that it could have freely increased its rates. But the result should be the same in either case, because the stay did not adjudicate any rights. The court which issued the stay has now spoken. It has declared the effect of its own order. In so doing it has created no important questions of federal law.

In view of the foregoing, Respondents respectfully pray that the petition for writ of certiorari by Socony Mobil Oil Company, Inc. should be denied.

Respectfully submitted,

W. M. Streetman
F. L. Andrews
Lewis T. Sweet, Jr.
2200 Gulf Building
Houston 2, Texas
Counsel For Respondents

September 6, 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 300

SOCONY MOBIL OIL COMPANY, INC.,
Petitioner,

v.

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS CO.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT CO., AND
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Respondents.

REPLY BRIEF OF SOCONY MOBIL OIL COMPANY, INC. ON PETITION FOR CERTIORARI

THOMAS FLETCHER
2025 First City National
Bank Bldg.
Houston 2, Texas
Attorney for Respondent
Socony Mobil Oil
Company, Inc.

Of Counsel:
JOHN L. DANIEL
First City National Bank
Building
Houston 2, Texas.

September 10, 1962

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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REPLY BRIEF OF SOCONY MOBIL OIL COMPANY, INC. ON PETITION FOR CERTIORARI

The Brief in Opposition of Respondents Brooklyn Union Gas Company, et al, seeks to distort the perspective of the Application, and we beg leave to file this Reply.

1.

Respondents Brooklyn Union, et al, (Brooklyn Union) do not meet the issues tendered or pretend to answer the cases

cited.[1] They beg the question upon pyramided assumptions that Commission jurisdiction over Mobil had been determined (though at all pertinent times it was being contested by judicial proceeding and no determination, administrative or judicial, was made); further, that there was an established violation of procedural regulations, §74 and 174-A, (applicable only to those who had either voluntarily filed or filed pursuant to determination of jurisdiction); and, finally, that the general procedural regulation of Order 174-A in the light of the foregoing assumptions furnished the basis for judicial determination of lawfulness, i. e., justness and reasonableness, a power statutorily granted only to the Commission.

The numbered paragraphs (Br. 1-2) illustrate this. The fact that there was no filed rate Brooklyn Union ignores. The claim that "change in rate" is the genesis of judicial right equally ignores the fact that Section 4(d) of the Act provides only for change of a "filed" rate (Pet. p. 12-17).

The suggestion that validity of Order 174-A is involved is a quibble. Whether Order 174-A constitutes rate-fixing as the Court held is studiously avoided.

Equally misleading is the claim that the courts below did not actually and necessarily invade the primary jurisdiction of the Commission and exercise its powers (Br. 2-3, 9-11, 19, 21). Paragraph 22 (Complaint, R. 37) contrasts a figure allegedly "the only lawful rate and charge" with a stipulated contract figure charged and paid, alleged to be unlawful. From this stemmed all of the various allegations in the complaint (R. 31, et seq), and the courts were invited to, and did, determine the one to be lawful, the other to be

[1] At top of page 13, Brooklyn Union cite cases dealing with restitution. These are not addressed to any question presented in the petition. (See FN. 10, Pet. p. 6). If this writ be granted, Mobil will, on the merits, distinguish and demonstrate inapplicability of these cases.

unlawful, and ordered a refund of the difference. It is inexcusable for Brooklyn Union to assume the issue that filing equates unlawfulness when Section 4(a) of the Act proclaims the only unlawful rate to be one unjust and unreasonable.

Mobil's failure to file, contesting jurisdiction, created a void, so that the courts below invested procedural Order 174-A with rate-making power, denied to the Commission by the Act; and used that as the norm to determine lawfulness under the Act for purposes of the directed refund. Thus such administrative determination was confessedly made by the courts below, and governed throughout all pertinent times.

A careful reading of the trial court's statement (Br. 4-7) discloses the fundamental misconception of the Act and Order 174-A to the effect described in Mobil's petition. By this misconception both courts below were misled and exercised prerogatives not possessed.

Brooklyn Union is silent as to why it failed to exhaust available administrative remedies under the Commission's Rules of Practice (Pet. 44).

In our submission Brooklyn Union does not escape or destroy the seriousness of the law questions presented by Mobil's petition by the mere naked declaration that such issues do not exist.

2.

The cases cited (Br. p. 9) do not warrant the preceding claims. *Nat. Gas Pipe* v. *Harrington* (5 Cir. 1957) 246 F. 2d 915, 919, cert. den. 356 U. S. 957, notes Orders 174 and 174-A, but concludes they merely fixed a time within which producers "*could* file", not *must* file as the same court held here. Restitution was based upon a specific contract and assumption thereto (p. 917-8) not on Orders 174 or 174-A as here.

Though "clear to all of the parties that the contract should have been filed," no resulting invalidity from failure to file was suggested either from the Act or said Orders. (p. 919) Instead the *unfiled* contract was declared controlling subject only to the Commission's Section 5(a) power. (p. 919)

The sentence "Any price in excess of the contract rate, was then contrary to the spirit, if not the letter, of the Natural Gas Act." (p. 919) furnishes no comfort to Respondents. The "excess" was the Oklahoma Commission Order, invalidated by *Nat. Gas Pipe. Line Co.* v. *Panoma* (1955) 349 U.S. 44. In *Harrington* such excess paid was contrary to the specific terms of the contract, thus wrong; but here no payment in excess of the contract rate was at any time demanded or paid.

In the other cases cited (Br. p. 9) each producer admitted jurisdiction and attorned by voluntary filing. They then were held to the governance of the procedural regulations of Order 174-A. None declared Order 174-A a rate-fixing order. Such cases demonstrate conclusively applicability of procedural Order 174-A only after filing.

The procedure of Order 174-A, applicable only to those admittedly or determined to be subject to regulation, did not purport to fix and make a lawful rate, but to establish a cut-off filing date behind which, because of the overwhelming administrative task entailed by producer regulation, the Commission would not review rate lawfulness, but beyond which the normal procedure established by the Act for rate review would become applicable. Since Section 5(a) permits review prospectively of a rate filed and then applicable, and Section 4(e) permits similar review of new filed rates retroactive to the effective date: administrative convenience was served by treating filed rates different from those filed as of the cut-off date as a change in rate. This not only placed the burden on the regulated company to justify the

rate, but guaranteed the review could be retroactive to the effective date. (Sec. 4(e)). The courts held this to be a reasonable accommodation to the dispatch of the torrent of administrative filings which the now famous *Phillips* case precipitated. This is not rate-making, nor a formula of lawfulness, but a plan for orderly disposition of filings.

3.

The statement (Br. p. 10) that Mobil "deliberately sought to evade the provisions of Section 4(d) and Order 174-A by litigation and the stay order" is not only untrue, but wholly without warrant or support in the record.

4.

The bland assurance (Br. p. 10-11) that Mobil and Ohio are the last parties who might have the issue here involved is absurd. So long as the Act exists questions will continue to arise, whether jurisdiction exists, and inquiry will be required into the various consequences on contracts, rights, and relations of parties springing from such controversies; as well as the roles and powers of parties, the Commission, and the courts, relating thereto. Authoritative settlement by this Court of the questions here for guidance of the parties, the Commission, and all courts is in the public interest.

Equally foolish is the statement (Br. p. 11) that all independent producers are now operating under the Act. There is no edict, legislative, administrative, judicial, or business, that makes presently regulated producers the only ones forever henceforth subject to the Act, or that forbids any producer, presently non-jurisdictional, or one who may hereafter become a producer, from engaging in a sale subject to the jurisdiction of the Act.

Mobil's present application rests wholly on its merits as a proposition of law.

5.

The statements (Br. p. 11-13) about the stay order are incorrect. What Mobil said is clear and not to be distorted (Pet. p. 8-10). The stay order did not purport to set rates or permit one rate to be collected over another. It furnishes no basis for restitution within the historical meaning of the doctrine.[2]

The statement (p. 13, 16) that the stay relieved Mobil of the duty to file is untrue. In *Magnolia Petroleum Company v. F. P. C.* (5 Cir. 1956) 236 F. 2d 783, cert. den. 352 U. S. 968, Mobil contended that Order 174-A did seek to compel a filing, which it declined to make because not subject to jurisdiction. The court held the order did not so require, and could affect Mobil only upon the contingency of future and further administrative action. Filing, if required, was not required by Order 174-A, but by the Act, which the stay order did not pretend to affect.

The claim that in an enforcement suit the courts would have been deterred from enforcing the mandate of Congress by the stay of a Commission procedural Regulation, which could not supersede or rise superior to Congressional command, is pure sophistry. Mobil at no time has agreed that the stay order relieved it from a duty to file.

6.

The effort (Pet. p. 13) to confuse this judicial act of determination with mere judicial identification is nonsensical. The undoubted power of a court to identify the filed effective rate is not involved here or questioned, as Re-

[2] Brooklyn Union (Br. p. 11) purports to state Ohio's position. On that Mobil expresses no opinion. That is the concern of Ohio. If it takes the position ascribed, such is not compulsory upon Mobil.

spondents well know. There being no filing or recognition of jurisdiction by Mobil, the courts below refused to recognize the contract rate as effective; instead, assumed the toga of the Commission, established and determined a just and reasonable rate, condemned another as unlawful, and directed reparations. In our submission the Court may not so exercise such administrative power.

7.

Brooklyn Union either misread *Willmut* (Pet. 19-20) and the Fifth Circuit's recent decision in *Hunt* v. *F. P. C.* (No. 19065, et al. decided July 19, 1962), or refuse to understand their holdings.

The court below held that a procedural regulation Order 174-A fixed rates, a power denied the Commission by the Act. Mobil's contention is the regulation may not be given such legislative effect. *Willmut* held that the Commission did not abuse its discretion in failing to adopt a regulation prohibiting filings under Section 4(d) because it had no such power.

In *Hunt*[3] a certificate application for a new sale resulted in a temporary certificate with a condition of a lower price, and a further condition that such lower price could not be changed during the continuance of the temporary certificate by the procedure of Section 4(d) of the Act. Because of the newness of this decision, we beg the Court's permission to quote three excerpts from that opinion which show the path to decision followed by the Fifth Circuit. In striking down such condition, the Court said:

[3] This case came to Mobil's attention after its petition had been forwarded for filing. By letter to the Clerk of August 6, 1962, copy to counsel, Mobil advised that it would contend that *Hunt* supported Point II (Pet. p. 17-20) and also constituted an intra-circuit conflict (Pet. p. 16).

"But we view the express prohibitions of § 4 increases as beyond the pale of administrative discretion. We do not think that under the guise of a condition of a temporary authorization, the Commission can forbid what Congress has expressly allowed to a natural gas producer. (p. 12, Folio copy).

* * *

"To allow this prohibition of § 4 condition, we would be as much as saying that in determining whether the addition of the proffered gas to the interstate market serves the public interest the rates to be prescribed are not those fixed under the sales contract by the parties. Rather the rates are those (a) fixed by the Commission in the first place and which are to continue until (b) the Commission itself fixes another level. This is a complete abandonment of the approach deliberately selected by Congress, and which, all must agree, was a radical break with traditional utility-type regulation.

"The consequences are too awesome for us to assume that Congress ever committed such undefinable legislative judgments to an administrative agency. (p. 16, folio copy)

* * *

"And, finally, the condition is so awesome because — and it is no more *reductio ad absurdum* to say — if the Commission may set aside § 4 and the rights, privileges and protections which it accords to a natural gas company subject to all of the obligations of the Act, then there is no end to the legislative tampering which the Commission may undertake. It may just as well deny the producer the right of review by rehearing or petition to the Courts under § 19(b)[19]." (p. 20-21, Folio copy.)[4]

Thus, in the instant case the court below accords to a procedural regulation, Order 174-A, a legislative effect to

[4] So stoutly did the Fifth Circuit feel that it closed its opinion with this striking sentence of obvious allusion: "That which Congress has joined together, let not the Commission put asunder."

permit utilization of power denied. But in *Hunt* the same Court of Appeals, in strong and striking language, prohibits similar action and indicates the extraordinary evil and abuse which could result were such power to be recognized in the Commission. If the court below in this case had followed the unanswerable logic employed so strongly in *Hunt*, it would have reversed the trial court with directions to dismiss the cause because of failure to state a federally cognizable cause of action, the chief cornerstone of Mobil's position.

Respectfully submitted

THOMAS FLETCHER
2025 First City National
Bank Bldg.
Houston 2, Texas

Attorney for Socony Mobil Oil
Company, Inc., Petitioner.